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REVOLUTIONARY RUSSIA

SIMON LITMAN
University of Illinois

From tyrannical autocracy to a most radically socialistic régime, from an empire oppressing subjugated peoples to a country proclaiming the principle of "self-determination of nationalities"—such has been the remarkable record of Russia during the past year. These changes, which have come to many as a surprise, were to those acquainted with the ferment permeating Russian life but the logical outcome of Russia's historic development.

In order to be able to interpret the trend of recent events there, events which since the overthrow of Tsarism have been moving with such bewildering rapidity, it is necessary to know what have been the forces that have shaped the life of the country. Russian evolution has come through periods of subjugation, through century long struggles for self-assertion against invaders, through many internal uprisings and through successful wars of expansion. Beginning as a small principality in the interior of a plain, Russia spread to the north and to the south, to the west and to the east until she became a world empire, in area the greatest compact country on the face of the earth, occupying 8,505,000 square miles, or larger in size than all of North America, and having a population of over 175,000,000 people.

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It is a long story from the time when over a thousand years ago a delegation of Russian Slavs went to Scandinavia in search of a ruler and, according to a legend, said: "Our country is large and abundant, but there is no order in it; come and rule over us." Thus an alien dynasty, that of Rurik, established itself in the Russian land. In the seventeenth century the house of Rurik was superseded by that of Romanoff, the first Romanoff having been elected by the boyards, or nobility.

Russian Slavs in the early periods of their national existence were democratic; witness one of the oldest of Russian sayings: "If a prince is bad, into the mud with him!" Their economic and social structure was communal in character. Spreading their settlements over the plains they subjugated weaker neighbors, but they were not strong enough to withstand the onslaught of the Asiatic tribes who conquered them. It was at this time that oriental despotism, alien to the spirit of the people, was superimposed on them. The Mongolian invasion was the underlying cause of autocracy which has characterized the government of Russia until the present revolution. At first the autocratic régime was a political necessity, because a strong centralized government was needed in order to defeat Russia's enemies, the Tatars. Owing to the vastness of the sparsely populated country and to the inertia and ignorance of the inhabitants, autocracy continued to impose its will upon Russia down into the twentieth century.

The struggle against despotism has been going on for almost one hundred years, the first attempt to overthrow it and to establish a constitutional form of government having been made in 1825. The participants in this abortive movement to emancipate Russia were a few nobles, some high army officers and some intellectuals, imbued with the ideas of the French revolution. The next important uprising—that of the seventies—was led by the representatives of the bourgeoisie and the landowning nobility, mostly students in the universities and in the women's colleges. It found no support in the mass of the people; the peasants, brutalized by heavy toil, half drunk from vodka, stood aloof. During the past thirty years conditions have greatly

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changed. The growth of large scale production attracted many mujiks from their poverty stricken hamlets and villages to industrial centers; there, because of natural intelligence and inherent love for freedom, they quickly learned the lessons of discontent; they were taught to understand what was really going on in the palaces of the Tsar and in the forbidding offices of his hirelings, and they became eager to follow the revolutionary leaders.

The revolt of 1904 was the first to derive some of its support from the proletariat, the laborers of the mills and factories, and from a certain part of the enlightened peasantry. The mental horizon of many mujiks was broadened by the persistent, self-sacrificing labor of those young men and women who braved the dungeon and the scaffold in order to spread throughout Russia the gospel of freedom. Although this revolution was drenched by the blood of many victims and failed to attain its object, it led, for the first time in the history of Russia, to some concessions on the part of the Tsar. The Duma came into existence, and Russia became what the *Almanac de Gotha* so aptly defined as a constitutional monarchy with an autocratic ruler.

It has been unfortunate that most people have viewed the Russian Empire through the eyes of either superficial observation or of willful misrepresentation. They have thought of Russia's masses either as homogeneous, peaceful, religious, living a life of self-contemplation, or as ignorant, servile, semi-barbarous Asiatics, threatening to descend at an opportune time upon prosperous Western Europe. In reality, the Russians are neither homogeneous, nor Asiatic, neither devoutly religious and somnolent, nor wickedly aggressive.

A great many races and nationalities are included in the 175,000,000 inhabitants comprising the population of this vast country. Furthermore, not only is the population of Russia heterogeneous, but Russian Slavs are themselves divided into different groups. We have heard so much of the inert, homogeneous people spread over vast horizonless plains that the dismemberment of Russia after the revolution has confused us. We knew of the relentless policy of russification carried on under the

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Romanoffs, but we thought that only a few small national units were outside of the body politic representing the Russian element in the population; we did not question the homogeneity of the Russians themselves. But there are Russians and Russians, and in many respects they are homogeneous. Homogeneous in the manifestations of those feelings and emotions which are common to all of us, whether we come from the Ural mountains or from the sunny valleys of California; homogeneous also in the wretchedness of their surroundings, in their primitive methods of agriculture, in a certain melancholy passive submissiveness to fate as well as in outbursts of hilarious joy when the opportunity presents itself; homogeneous also in certain externalities, such as a liberal use of the samovar, fondness for *schtchi* and *kvas*, the facility with which they proclaim anathemas against real and imaginary foes, the indulgence once in a while in a hot steam bath.

Notwithstanding these common characteristics there have existed since their earliest history three distinct branches of Russians. In the eighth century, perhaps earlier, a stream of slavic colonization advanced east from the Danube and occupied the plains of southwestern Russia; these are the Little Russians or Ukrainians who number at present about 27,000,000. Another stream of colonization, the Great Russians, came from the Elbe, through the basin of the Vistula and occupied the central and northern parts of Russia; the Great Russians represent the largest single element in the Russian population, numbering over 60,000,000. The smallest group are the White Russians, about 6,000,000 souls. The original differences between these branches of Russians were increased by contact with different nationalities, the Great Russians with the Finns, the Little Russians with the Turks and the White Russians with the Lithuanians.

An important element in the Russian population has been the Cossacks, who dwell on the steppes of Southern Russia where the rivers Dnieper, Don and Volga empty themselves into the Black, the Azov and the Caspian seas. As hunters and fishermen they led a semi-nomadic existence and because of the danger of

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attacks by the Tatars they were always armed. As time went on the Cossacks increased in numbers through their acceptance of every outlaw, every runaway serf, every discontented nobleman. In the free life of the steppes they developed those qualities of restless aggressiveness which later made them a menace to the Turks, to the Poles and to the Muscovites. Through centuries they were the keepers of the crude Russian conceptions of liberty and of equality, and later on as the deputies in the Duma they proved radical and fearless. Most of the Cossacks are Little Russian in speech and but a few of them, the Kalmucks, are Mongolian in origin; the Kalmucks were subdued by the Don Cossacks and became a part of their organization.

Amongst other races and nationalities that dwell on Russian territory may be mentioned in the order of their numerical superiority—the Poles, the Finns, the Jews, the Lithuanians, the Tatars, the Kirghiz, the Germans, the Roumanians, the Bashkirs, the Georgians, the Armenians, and the Circassians.

One of the contributory causes to the success of the present revolution was the autocratic policy of oppressing not only individuals but entire nations, and not only alien nations, but nations of Russian stock; and one of the first results of this revolution was the separatist agitation in all parts of the empire. It was the oppressed, embittered peoples that led the movement for revolt and helped to throw off the yoke of despotism, and the leaders of New Russia recognizing this were from the very first willing to accede to claims for separation. The dismemberment of Russia is not due to the Bolsheviki. It started before the seizure of power by the Maximalists and it would have occurred under any government of freed Russia.

The idea that Russia is Asiatic was "made in Germany." It is the product of German Junkerdom concocted partially in order to intimidate the German people into bearing the heavy burden of militarism placed upon them, partially to alienate from Russia the sympathies of the Western world thus leaving her an easier victim to German machinations. Official Germany ceased fearing Russia long ago. In the eighteenth century and during the first half of the nineteenth century, when Germany was a nation

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of philosophers, musicians and poets, when she was divided into many independent kingdoms and principalities whose strength and glory was not in the sword but in the pen, she may have genuinely dreaded attacks from Imperialistic Russia. But Germany united by blood and iron, militaristic, Prussianized Germany never feared Russia; she merely feigned the fear, and she did it so well as to deceive completely even her own people.

With German colonists occupying some of Russia's best lands, with German merchants and bankers established in all the leading cities of Russia, with German spies honeycombing the country, with German officials permeating the Russian administration, the Russian army and the Russian court, with a German Tsarina on the Russian throne, Germany knew Russia too well to fear her. In fact she feared her so little that at the outbreak of hostilities she practically denuded her Eastern frontier of troops; it was only when Grand Duke Nicholas took his task of aiding the Allies seriously and advanced into Prussian territory that Germany rushed back from France a part of her army in order to drive away the invaders.

The Russians are not Asiatic. It is true that within the confines of Russia, there are many millions of Tatars, Kirghiz, Bashkirs and other oriental tribes; but these form a comparatively small minority in the sum total of the Russian population and it was not to these that official Germany referred when she insidiously propagated the view that Russians are oriental savages. And even while spreading this view Germany was "peacefully penetrating" into Russia and helping to maintain there the only remnant of Asia—that cruel and corrupt despotism which was superimposed upon a democratic people at the time of the Tatar invasion. It was to official Germany's advantage to support oriental despotism in Russia, to keep in ignorance and poverty the Russian masses, just as it was to her advantage to organize pogroms against Jews whom she regarded as one of the obstacles to her scheme for the commercial exploitation of this rich country. We have all heard of the Cossacks and of the rôle they have played in killing striking laborers, students and Jews, but it is not so well known that usually the

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wildest of the Cossack tribes, the Kalmucks, were selected for this cruel work and even these were often led not by their own men but by German officers who faithfully executed the orders of the Tsar or his intriguing advisers.

The Russians are not Asiatic. Russian contributions to literature, to painting, to music, to science, all bear witness to the fact that they are of the West and not of the East. It is the spirit of the West that animates the poems of Pushkin and of Lermontov, the novels of Tolstoy and of Turgenev, the stories of Chekhov and of Kuprin; it is the spirit of the West that expresses itself in the symphonies of Tschaikowsky and of Rimsky-Korsakov, in the paintings of Vereshchagin and of Repin. The only manifestation of orientalism which can be discerned in the Russian people is the quality of nonresistance; and this may be due not to the fatalism of the Orient, the result of religious belief, but to the influences of geographic environment, to the vast expanse of barren wastes, of impassable marshes and primeval forests over which sweep unchecked the icy winds from the north. In such an environment the people of a sparsely settled country, if they lack the energy, the initiative and the perseverance which characterize the frontiersmen, feel themselves more or less helpless. Russian mujiks, in their wretched huts, faced desolation for so long, shivering from cold or parched by heat, they endured for so long the gnawing pangs of hunger, watching their children die from malnutrition and ravaging disease, that they became too benumbed to resist what seemed to them the inevitable.

It took three years of the most horrible war in Russian history to undermine the power of the strongly entrenched, crafty semi-German bureaucracy which ruled over the land. But these three dreadful years have served at least one good cause; they have forced even the dullest of peasants to think and to rebel. One of the chief factors which brought into action the latent powers of the peasant was prohibition. Prohibition which was originally introduced as a temporary war measure at the time of the first mobilization proved so enormously beneficial that at the request of the peasants themselves it remained on the

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statute books; this more than any one thing helped the peasant to the consciousness of his manhood. The revolution of 1917, unlike many abortive attempts which preceded it, found a sober Russia ready to follow her liberators.

Another important reason for the success of the revolution has been the almost total elimination of the Tsar's strongest weapon, the old, servile army. Killed, disabled, imprisoned, this army was replaced by one composed chiefly of peasant soldiers who were in service but a few months before the outbreak of the revolt; and these new soldiers in the memorable day of March, 1917, refused to shoot on laborers in whom they recognized fellow sufferers.

The present power of the socialists in general and of the Bolsheviki in particular may be attributed to the fact that under the stress of the war the Russian machinery of production and distribution collapsed. With a government not bent on doing its best, but scheming and plotting to betray the people, the capitalistic order of society in Russia proved its utter inefficiency and helplessness. Even under the most far-sighted and capable leadership agricultural Russia, with her infant industries, her sparse population, her inadequate railway system, her wretched highways, would have had an almost superhuman task not to succumb in her fight with the most powerful industrial and military nation of Europe. As it was, three years of warfare absorbed most of her available resources and brought her to the brink of financial and economic ruin. The discontent became widespread, famine in many parts of the country imminent.

Little wonder that, after the overthrow of autocracy, the poor and the suffering, the cold and the hungry, were willing to accept any régime that promised them relief. Ignorant of what were the real causes of the calamity that overwhelmed them, bewildered by the appearance of various political parties, incapable of examining the validity of the claims of opposing factions, the mass of the people accepted the leadership of those who spoke most loudly, acted most vigorously and who promised them the greatest amount of prosperity and the quickest way to peace and to leisure. These bewildered masses are not traitors; they are the victims of circumstances.

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The Russian mujik—75 per cent of the Russian population are mujiks—knows nothing of the meaning and of the obligations of a state. Until the abdication of the Tsar, the state and the Tsar were inseparably associated in his mind; it was by looking at the ubiquitous picture of the "Little Father," to be found even in the most wretched hut, that he in a dim, subconscious way visualized the power, the dignity and the sovereignty of the state; that state which oppressed him, to which he owed obedience and taxes, but which in its pomp and glory was something mysterious, far removed from his miserable work-a-day existence. After the revolution the Tsar and with him the state suddenly disappeared. The mujik was told that he was free, and this freedom meant to him peace, food, land.

Russia's withdrawal from the war was not due to the Bolsheviki. The ministries of Lvov and of Kerensky were deposed largely because they wanted to continue the struggle against the Central Powers. Russia was weary of what seemed to her an unequal contest. Both the soldiers at the front and the people back of the trenches, not realizing what was really at stake, were clamoring for peace. For three years Russian armies poorly fed and clad, without the necessary arms and ammunition, betrayed by many of their generals, fought a losing, hopeless fight with the enemy. Millions of Russian soldiers were killed, maimed or taken prisoners to work as slaves in Germany while their families were starving at home. Old armies were wiped out and new ones were formed; these latter continued to fight not knowing why; they fought while the Tsar's ministers were maintaining secret communications with the German leaders; they fought stubbornly and bravely. And then came the Tsar's forced abdication.

Germany took immediate advantage of the confusion that ensued. While the Allies were undecided, lukewarmly supporting the provisional government and waiting for further developments, Germany distributed throughout Russia millions of anti-war and anti-Allies pamphlets, sent there thousands of her most skillful agents, and helped to bring back many of Russia's exiled visionaries and fanatics. Kerensky's order

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democratizing the army helped her plans. This order was issued because the revolutionary government feared that some of the generals of the old régime were not true to the cause of the revolution. The new government had every reason to distrust a docile army, obedient to its officers; too often in the past had such an army been used in Russia to defeat the aims of the people. But the troops without discipline fell an easy prey to German machinations. Their morale was quickly destroyed and then nothing stood in the way of Germany's advance into the heart of Russia.

As yet we have no evidence to substantiate the charge that the leaders of the Bolsheviki are in reality paid agents of Germany. So much has been made of the fact that Lenine came to Russia after the proclamation of political amnesty via Germany. There are obvious reasons why Germany was willing to let Lenine and perhaps hundreds of other agitators go through her territory. She knew them to be possessed of fanatical ideas, embittered against capitalism in general and against the capitalistic class in Russia in particular; she knew how great would be their influence amongst the half dazed, just liberated people, hungry for bread, for land, for peace. In the confusion, the chaos which their arrival into Russia would create, Germany saw the opportunity to serve her purpose.

It is also comprehensible why the Bolsheviki accepted the temporary hospitality of the German railways. They were bent on getting to Russia in the quickest possible way, and it was immaterial to them how they went. They would have gone via New Zealand or Guatemala just as well, could they have made greater haste.

Those who have been viewing the Russian situation from one angle only, that of the Allied cause, cannot understand the feelings which animated some of these expatriates and exiles as they sped towards Russia. With them the great war, which means so much to us, was a secondary issue. They were dreaming, talking, writing of another, to them a much greater war—the war of the liberation of toilers from the oppression of capitalists, wherever these toilers or these capitalists might be. We may

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sneer at the impracticability of their ideas, we may shudder at the thought as to where the success of their efforts may lead, we may pity those who either driven by hunger or swayed by their emotions follow such leaders, but we should not, unless we are perfectly sure of our ground, speak of them as paid agents of the German government.

Official Germany does not wish anything better than that we should believe that the Maximalists are traitors, and that because of this belief we should forsake the new Russian Republic. Thus forsaken Russia will continue to be a victim of Germany in the future as she has been her victim in the past.

Even grave mistakes committed in Russia at such a critical time should not prevent the United States from keeping ever in mind the thought that the Russian masses have made a long and brave fight for political emancipation and that the freedom which they seek has as high an ideal as has ever been held by any people.

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THE JURISTIC CONCEPTION OF THE STATE

BY W. W. WILLOUGHBY
Johns Hopkins University

A society of human individuals viewed as a politically organized unit is termed a state. The state, which, in its various activities and forms of organization, furnishes the material for political science, may be regarded from a number of standpoints. It may be studied sociologically as one of the factors as well as one of the results of communal life; it may be examined historically for the purpose of ascertaining the part which it has played in the life of humanity, its varying phases of development being traced and their several causes and results determined; it may be considered as an entity, to the existence and activities of which are to be applied the ethical criteria which the moralist and philosopher establish; it may be psychologically surveyed in order to make plain the manifestations of will, emotion and judgment which support and characterize its life; it may be regarded from the purely practical standpoint to determine how it may be most efficiently organized and operated; and, finally, it may be envisaged and studied simply as an instrumentality for the creation and enforcement of law. It is with the state, as viewed in this last aspect, that analytical political philosophy is concerned.

The point of departure of the analytical jurist is that in all communities which have reached any degree of definite political organization, public affairs, whether domestic or international, are not carried on in a haphazard manner, without system or fixed principles, but are governed by bodies of rules logically related to one another and all depending, as deductive conclusions, upon certain assumptions regarding the juristic nature of the state, of its sovereignty, of its law, and of the relations which it bears towards other bodies politic as similarly viewed.

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Thus analytical political philosophy starts with certain primary assumptions or definitions from which, by deductive reasoning, it determines those principles which give a systematic and logical character to constitutional and international jurisprudence.

It will thus be seen that analytical political theory is a purely formalistic inquiry. Its task is not to seek substantive truth, but to provide conceptions and to furnish an apparatus of thought by the employment of which public law thinking may be systematized and its various propositions brought into legal harmony with one another. By the methods which it employs, a given constitutional system may be analyzed and the fundamental conceptions upon which it is based revealed. Or, working in the other direction, these fundamental conceptions being given, the constitutional doctrines which are logically deducible from them may be stated.

What has been said with reference to constitutional concepts applies with equal force in the field of international jurisprudence. There, too, an analytical examination of the generally accepted principles of the relations of one state to another shows that they are founded upon certain primary conceptions as to the juristic nature of states viewed as the subjects of international law, certain conceptions, that is, as to their equality of status and the rights and powers connoted by their existence as severally independent political entities.

Considered negatively, it will be seen that analytical political theory is not curious regarding the historical origin of political authority among men, nor of the historical circumstances surrounding the birth of any particular sovereignty. It does not inquire as to the ethical right of the state to exist, nor as to its ethically legitimate sphere of authority, nor concerning the purposes which political government may be made to subserve, nor as to the elements which go to increase or diminish the strength and importance of a given state. It is indifferent to all questions as to the relative merits of different forms of government or of different administrative systems. It takes political institutions as it finds them, and views them in a single aspect,

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namely, as legal institutions, and, as thus viewed, seeks to ascertain the essential qualities exhibited by them.

The point from which the analytical political philosopher starts is that a politically organized group of individuals may be conceived of as constituting an essential unity, and that the entity thus created may be regarded as a person in the legal sense of the word; that is, as a being, existing in idea, possessing legal rights and obligations as distinguished from those of the individuals who, concretely viewed, make up its body politic, and that, as such a personality, it is, through organs of its own creation, capable of formulating and uttering a legal will with reference to matters within the jurisdiction conceded to it.

Regarded as a legal person the prime characteristic of the state is that there is posited of it a will that is legally supreme. By its express command, or by its tacit acquiescence, it is thus viewed as the ultimate source of legality for every act committed by its own agents or by any persons whomsoever over whom it claims authority. This supreme legally legitimizing will is termed sovereignty. The idea connoted by it is one purely of legal competence or jurisdiction. No element of actual power (as distinguished from will), or of moral right, or of political expediency, is involved.

The starting point for this conception of the state is indeed antithetical to that taken by the moralist, if, in truth, two points of view which have no relation to one another can be said, under any conditions, to be antithetical.

There is little dispute among ethical writers of the present day that all theories of moral obligations must begin with the individual; that, though his rights and duties may be stated in social terms, fundamentally he is self-legislative, determining for himself the ethical quality of his own acts and of the acts of others with whom he is brought into relation. This, of course, does not mean that his judgments may be arbitrary ones, for, when ethically justified, they are governed by the general principles which his own reason supplies and from which, therefore, he cannot escape. And if, as a result of this, he is forced to seek his own welfare in the welfare of the social whole, it still remains

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true that, in the last analysis, the determination of the individual's good remains the beginning and end of all ethical speculation. And this, of course, holds true when the relation of the individual to political authority is considered from the ethical point of view.

When, however, from the ethical we turn to the purely juristic inquiry as to the legal relations which unite the state and the individual, we start with the state—with the center rather than the periphery. In other words, beginning at the center, we view the supreme political person as the sole source of political or legal rights, both for itself and its governmental organs, and for all the persons, natural and artificial, who are subject to its authority. Only thus, it is found, can the principles of public and private right which are recognized in practice be harmonized with one another and brought into a systemized whole. In other words, it is only when the juristic conception of the state has been determined that the nature of law, and of civil liberty, clearly appear, and that criteria are provided for determining the constitutional status of all political units, whether they be parish or school districts or kingdoms like Prussia, or a vast empire like that of Great Britain.

This unlimited legal competence which is predicated of the sovereign state connotes the authority to determine the legal rights and duties which shall exist so far as it is itself concerned, and to fix the territorial limits within which it will not permit, without its consent, the enforcement of other legal rights and duties which owe their existence to another sovereignty. This postulated legal omnipotence also carries with it the authority to declare, without reference to territorial limits, what persons shall be deemed to owe an allegiance to the state in question and an obedience to the commands which it utters. It thus results that all areas of land and water, and all persons, whatever their other political relations and affiliations, are potentially subject to the legal control of any given state. That is, it is possible by a mere exercise of its sovereign will to bring them within a control, the legal validity of which its own courts cannot question.

As long as there are a number of states, each with a legally

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omnipotent will, it is apparent that conflicts may arise by reason of two or more states claiming exclusive legal control over particular persons or particular pieces of land or sea. The adjustment or prevention of these conflicts is the task of international law and is a subject which cannot be here considered. But the fact that the necessities of international life compel every sovereign state to refrain from the exercise, in certain respects, of a jurisdiction over persons and territory which it might, if it saw fit, bring within the scope of its legal will, does not in any wise, or to any degree, derogate from that legal omnipotency which, from a constitutional point of view, the sovereign state possesses. That this conception of sovereignty constitutes a fundamental principle in the constitutional jurisprudence of every state whose acts are guided by definite public law principles, is shown by the fact that the courts of all states uniformly hold themselves conclusively bound by the assertions of what is called the political departments of the government, of a claim of sovereignty whether with reference to a control of individuals or of territory.

The fact that the sovereignty of a state is not limited in its operation or exercise to a definite territory is shown by the circumstance that every state exercises a certain amount of legal authority, irrespective of locality. Thus, of course, all states exercise authority over the high seas. Again the subject of a state remains a subject wherever he may happen to be, and is entitled to his state's protection as such and, furthermore, he may be held legally responsible to his state for what he does while in a foreign country. For example, not a few states give extraterritorial effect to their criminal laws and, when the opportunity offers, punish their subjects for the violation of them whenever that violation occurs. The United States which, generally speaking, does not give extraterritorial effect to its criminal laws, would nevertheless punish its own citizens for treasonable acts committed by them when abroad.

Sovereignty is the name given to the supreme will of the state which finds expression in legally binding commands. As thus conceived, sovereignty is an abstract term. It connotes the state

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as a volitional entity or political person and designates that faculty which this political person possesses of determining by its fiat what shall be the legal rights and legal duties which it will recognize and, if necessary, enforce; what persons it will consider subject to its authority; and over what territory it will claim jurisdiction.

Viewed as a quality or faculty of statehood, and as connoting legal omnipotence rather than physical power, sovereignty is, by its very nature, a unity. It is the name ascribed to the will of a legally supreme political person. It is the plenary faculty which that entity is assumed to possess to express its will in the form of commands legally binding upon all persons over whom it sees fit to claim jurisdiction and with respect to any matters which it may select.

It is, of course, to be understood that, when we speak of the state as willing this or that, and describe laws as being the formulated expressions of these volitions of the state, this is but a juristic mode of speaking. The state, not being a physical living person—even though, in a certain sense, it may possibly be claimed to be a "real" person—it cannot possess or exercise a will of its own in the sense that a human person is able to do. The substance of what is actually willed is determined by those individual persons who have control of the government, and these, of course, are more or less influenced in their determination by the wishes of the people generally. Though juristically viewed as expressions of the will of the state, laws, in their substantive provisions, express the wills of human individuals.

The exercise of sovereignty is conceived of as delegated by a state to the various organs which, collectively, constitute the government. For practical political reasons which can be easily appreciated, those who determine the public policies of a state ordinarily prefer that these policies should be formulated and executed by governmental agencies of their own creation and which are not subject to the control of other states. There is, however, nothing in the nature of sovereignty or of state life which prevents one state from entrusting the exercise of certain powers to the governmental agencies of another state. Theo-

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retically, indeed, a sovereign state may go to any extent in the delegation of the exercise of its powers to the governmental agencies of other states, those governmental agencies thus becoming *quoad hoc* parts of the governmental machinery of the state whose sovereignty is exercised. At the same time these agencies do not cease to be instrumentalities for the expression of the will of the state by which they were originally created.

By this delegation the sovereignty of the state which so delegates such powers is not impaired or parted with, for, by legal hypothesis (and we are of course here concerned only with legal ideas), it is the will of this state which is expressed, and this state possesses the legal competence again to draw to itself the exercise, through organs of its own creation, of the powers it has granted. Thus mother countries may concede to colonies almost complete autonomy of government and reserve to themselves a right of control of so slight and negative a character as to make its exercise a rare and improbable occurrence; yet, so long as such right of control is recognized to exist, and the autonomy of the colonies is conceded to be founded upon a grant and continuing consent of the mother countries, the sovereignty of those mother countries over them is complete and they are to be considered as possessing only administrative autonomy and not political independence. Again, in the so-called federal or composite state, the coöperating states may yield to the central government the exercise of almost all of their powers of government and yet retain their several sovereignties. Or, on the other hand, a state may, without parting with its sovereignty or lessening its territorial application, yield to the governing organs of particular areas such an amplitude of powers as to create of them bodies politic endowed with almost all of the characteristics of independent states. In all states, indeed, when of any considerable size, efficiency of administration demands that certain autonomous powers of local self-government be granted to particular districts.

In all those cases in which, owing to the manner in which the governmental powers have been distributed, there is doubt as to the political body in which the sovereignty rests, the test to

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be applied is the determination of which political body has the organ which, in the last instance, has the legal power to determine its own competency as well as that of the others. For the essential criterion of the sovereign state is a supreme will, not only as giving the ultimate validity to all law, but as itself determining the scope of its own powers, and itself deciding what interests shall be subjected to its regulation. It sets to itself its own rights and establishes the limits of its own authority. As Jellinek puts it in his work *Gesetz und Verordnung:* "The rights and duties of individuals receive their potency and authority from grounds set forth in objective law. The state finds the grounds for its own rights and duties in itself." Or, as he expresses it in another work: "Obligation through its own will is the legal characteristic of the state."

It has been seen that when sovereignty is predicated of a state, there is asserted the doctrine that the state is the creator of all the laws in accordance with which its own activities are conducted. In other words, it sets to itself, or rather to its governmental organs and officials, their legal powers. This competency on the part of the state to determine its own legal competency—"Kompetenz Kompetenz," as the Germans term it—distinguishes the state from all other human associations of a political or juristic character. The state is supreme, not only as giving the ultimate validity to all the laws which are to fix the rights and obligations of those over whom it chooses to claim jurisdiction, but it is supreme as itself determining the scope of the legal powers of its own governmental agencies and the manner of their exercise. Thus at any one time the domain of the legal and political liberties of the individual is simply that field of interests which the state has willed shall be protected from violation, whether by private persons or public officials. From the possible control of the state itself, however—from the very source of all law—there can be no possible legal guarantee of immunity, except in the formal sense that, from its very nature, a state must express and execute its will in the form of law. Private individuals and those who are in possession of public authority may indeed invade the rights of the individual and destroy those

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interests which existing law defines and establishes and which the state professes to defend, but such action because illegal, cannot be said to be the act of the state itself, even if committed by its highest rulers.

It follows, *a fortiori*, that if a state cannot by its own law limit or impair its own sovereignty, it is unable, legally speaking, to decree its own dissolution. An existing government may, by perfectly legal processes, transfer its entire powers to another governing machinery, but this does not imply a dissolution of the state itself. Only when the transfer of authority from one set of governmental agencies to another is effected by illegal, that is, by revolutionary means, can it be said that the old state has gone out of existence and a new one been created. But this transfer, being by illegal means, the operation cannot be said to have been due to an act of the deceased state which, by its very nature, can act only in and through law. The death of the old state cannot, therefore, be viewed as a case of *felo de se*, but as due to an act coming from outside itself, and as illegal when regarded from its own point of view. The fact that its citizens generally and its public officials in particular have acquiesced in, or even taken active steps to bring about the establishment of the new state and the new government is, of course, of great political significance, but is without potency to transmute an essentially illegal act into a legal operation.

The same reasoning which supports the proposition that a state may not by its own laws limit or destroy its own sovereignty is adequate to sustain the doctrine that a state may not alienate its sovereignty to another state. And, of course, if sovereignty may not thus be alienated, it may not be acquired by grant from another state.

In result, then, we may say that, strictly speaking, a juristic origin cannot be ascribed to sovereignty. Legally, each sovereign state starts, as it were, *de novo*, and cannot have any legal bonds that unite it to any previously existing political body. Juristically a new state can take its origin only by the entire withdrawal of the people organized under it from the civic bonds under which they may have been living, and the establishment

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by them of a new body politic. Not until the old state has been destroyed, either peaceably or by force, can the new state take its rise. It cannot derive its vitality from the old, for, as we have seen, the transference of sovereignty is a legal impossibility.

Whenever there is established a new government whose powers are obtained through constitutional means, no new state is created, however much its powers may differ from those exercised under the old régime. There is only an amendment of the constitution of the old state and a change in its governmental form or policy. Its legal continuity is not broken, even though the entire governmental organization of the state is altered. It is not the amount of the change but the manner in which it is effected that is juristically decisive.

Does this mean, then, that the legal continuity of a state's existence is destroyed whenever there is effected an illegal alteration in its constitution? It is possible to push the logic of our reasoning as far as this. But it is sufficiently consistent to say that the old state has been destroyed and a new one created only in those cases in which there has been brought into being what is substantially a new government, or where a new constitution, as a whole, has been put into force in a manner other than that provided for in the old instrument.

Whether a given political body possesses sovereignty, or whether it merely exercises jurisdiction by way of grant or delegation from another political person in whom the real sovereignty resides, is a question rather of legal view than of objective fact—it is a question to be determined by the point of approach which is assumed, rather than by a measurement of the amount of physical power and discretionary authority actually exercised. Thus it is conceded as a proposition of law that such legal jurisdiction as the Dominion of Canada or the Australian Commonwealth possesses is derived by grant from the sovereign will of Great Britain. And yet there is no doubt that the mother country has not the actual power to withdraw that grant or to take any action that would be seriously inconsistent with the autonomous status at present enjoyed by her "Dominions beyond the Seas."

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It has, however, not infrequently happened that the claim of a political entity to the possession of legal sovereignty has not been conceded by another state. Thus, in the United States there continued for nearly a hundred years a dispute as to whether or not the individual states of the Union were without sovereignty and dependent for their political existence upon the sovereign will of the United States conceived of as a single political entity. When such a controversy exists it is improper to declare apodictically that the one side is right and the other side is wrong. For each side can be said to be qualified to judge of its own status and that of the other from such legal point of view as it may see fit to assume. Looked at, however, from the standpoint of a third person or an impartial critic, the contention of the one or the other of the parties may be shown to be the more in consonance with the facts of concrete power and influence.

This definition of sovereignty which has been outlined is a simple and easily apprehended one and is susceptible of consistent application throughout the field of analytical political philosophy. In order, however, that there may be no possible confusion of thought, it will be desirable to distinguish the term as thus employed from other applications which, unfortunately, common usage gives to it.

In the first place, according to the definition which we have given to it, the term "sovereignty" has no proper application in the field of international relations. This will sufficiently appear when we come to consider the conception of the state as employed in international law.

In the second place, sovereignty has no connection whatever with material or physical power. Thus sovereignty is an attribute of the smallest and weakest of states as fully as it is of the mightiest empire. And, furthermore, it carries with it no implication that there exists in a state the ability actually to enforce those expressions of its will which, *ex hypothesi*, it has the juristic competence to utter. For the sovereign state knows no limit, whether territorial or personal, to its legislative authority, whereas, of course, every state is in fact limited in the extent of its power not only by the existence of other states, but by the

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temper and disposition of its own subjects. At any one time a state actually exercises through its governmental organization only those powers which it has seen fit to draw to itself. The residue belongs to it only in a potential aspect, and at any one time the amount of this power and the manner in which it is, or may be, actually exercised, depends, of course, upon the character and disposition of its citizens; that is to say, upon their willingness to submit to such exercise without insurrection. As a mere matter of power, every government depends, as Hume pointed out, upon public opinion, but this ultimate might of the people is not juristic in character except as it has received formal recognition in law.

Sovereignty inheres in the state as an attribute flowing from its existence as a political person. It therefore is not possessed by any one of its governmental organs or by the government as a whole. This appears when the proper distinction is made between a state and its government: the government exercises, but does not possess, sovereignty. The various governmental organs are but the agencies through which the sovereign will of the state is expressed and carried into execution. Those organs which formulate and express in authoritative form the will of the state are termed the law making organs of the state. Ordinarily the will of the modern so-called constitutional state is authentically expressed through a body termed the legislature. There is, however, no difficulty in endowing other organs of government with authority to give authentic expression to the state's will. Thus the courts may in certain cases be considered to have the authority not only *jus dicere*, but *jus dare*. Again, a certain amount of legislative power may be vested in a special organ of government and only occasionally exercised, as is the case in the United States when constitutional law is created by constitutional conventions or by legislatures acting as such, or, where the people by the referendum are granted a participation in the making of law.

A very common usage is that which described as sovereign that organ of government which plays the more important or decisive part in the determination of what the state shall will,

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that is, which controls in fact the policies of the state. Thus, in an absolute monarchy, or in a limited monarchy in which the crown retains a dominant influence in government, the king is often spoken of as the possessor of sovereignty. So, similarly, in states organized upon the democratic or representative basis, the people are spoken of as constituting collectively the entity in which the sovereignty inheres. This is an inaccurate statement, whatever may be the extent of the political authority of the absolute monarch, of the constitutional ruler, or of the citizen body. It is, indeed, of very great importance to determine in the case of any constitutional system whether all public powers shall be deemed to find their legal origin in an assumed *plenitudo potestatis* of a monarch, or in the body politic from which by specific delegation the competences of other governmental officials are considered to derive their existence. But the sovereignty itself inheres in and is possessed by that political entity or person which we term the state. A government or any of its organs never does more than exercise sovereignty in behalf of, and as an agency of, the state.

As a mere matter of titular distinction it is common to speak of the ruler of a monarchically organized state as the sovereign of the state. This usage, which prevails especially in international relations, has no relation to the constitutional powers or status of the king, czar, emperor, sultan, or whatever he may be termed. The ruler whose actual influence and authority is insignificant is as universally termed the sovereign in this honorific sense as is the most powerful autocratic prince.

The phrase "the Law is sovereign," which is not infrequently met with, has no other juristic significance than that the state is able to speak its legal will only in the form of law and in accordance with the constitutional provisions that, at the given time, are in existence. Stated negatively, it means that every governmental official must be able to justify every exercise of public power upon his part by a reference to a constitutional or other valid statutory delegation to him of legal authority. Purely personal and arbitrary discretionary power is thus excluded. The doctrine is that stated by Mr. Justice Matthews, when he

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says that "the law is the definition and limitation of power."[1] The same principle is enounced in the Massachusetts constitution when it declares the government to be one of laws and not of men.

The terms, then, "sovereignty of the people," "popular sovereignty," and "national sovereignty" cannot accurately be held to mean that, under an established government, the sovereignty remains in the people. It does mean, however, to repeat what has already been once said, that the constitutional jurisprudence of the state is predicated upon the principle that no person or organ of government is to be regarded as the source whence, by delegation, all other public powers are derived, and as such the residual claimant to all undelegated powers. It furthermore may mean that constitutional provision is made whereby an electorate, composed of a considerable portion of the adults of the community, is authorized to perform important functions of government, as, for example, the initiation and ratification of constitutional laws. And in this connection it may be said that in so far as a portion of the people exercises the suffrage for the election or recall of public officials or for the proposing and approval of laws, or for any other public purpose as provided by law, the electorate is to be considered a part of the governmental machinery of the state.

Finally, it may be said that the term "sovereignty of the people" very often connotes a principle that is not juristic at all, but rather, the ethical doctrine that every group of individuals has a continuing inherent moral right themselves to determine, by whatever means they think appropriate for the purpose, the form of government under which they are to live, what it shall do, and the persons into whose hands its operations shall be entrusted.

Thus far we have been dealing with the state as a concept of national or municipal law. The scope of this paper does not warrant us in attempting to determine the conception of the state as fixed by international jurisprudence. It will be appropriate, however, to enter this field to an extent that will enable

[1] Yick Wo v. Hopkins, 118 U. S., 356.

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us to determine whether the constitutional concept can be applied in the science of international law.

Although accepted as a working principle in international law, the division of the world's lands into what are called independent territorial units does not carry with it the predicate that each of these areas is subject to the absolute and exclusive control of a given government. For, as has already been said, each government is held responsible by other governments for what goes on within the limits conceded to it by them; and the extent of this responsibility measures the degree to which its jurisdiction is neither exclusive nor absolute. With regard not only to aliens within its borders, but even, in certain respects, with regard to its own citizens, a state may be held accountable for its acts by other states. Every state claims, and, when necessary, exercises the right to see to it that its own citizens while abroad are reasonably and fairly protected in life, liberty and property by the government of the place where they are; and international law writers agree that there are various grounds which justify the intervention by states to correct what they conceive to be abuses of authority by other states, even with regard to their own subjects. A very wise policy dictates, however, that only in extreme cases should intervention in this latter class of cases be resorted to.

Though internationally the jurisdiction of a state over its own territory is not absolute or exclusive, it is absolute and exclusive when constitutionally viewed. Though, as we have seen, constitutional theory places no limits to the exercise of the state's sovereignty, it does declare that within the territory which is claimed as peculiarly its own, its authority is both absolute and exclusive. This means, of course, that no officer or organ of another power, may, without its consent, exercise legal authority within its borders. And, while in its international relations it recognizes that other states may, in certain cases, take cognizance of the manner in which it exercises its sovereign power, intervention, when it comes, is one of force and not of law.

As regards their origin, the laws of international life do not find their birth in the mandatory utterances of supreme wills declaring

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to inferior persons what for them shall be deemed legally right and legally wrong. Instead, law appears as stating rules of action which derive their force from the fact that they have been accepted by those political persons—the states—whose actions they are to regulate. This acceptance may, indeed, be one which, for the most part, the states may not find it practicable to avoid, even should they so desire; and thus, in fact, the rules of international intercourse may, *arguendo*, be admitted to be as definite, and, in general, as uniformly conformed to, as are the provisions of the municipal law of the most orderly state. This, however, does not change the essential character of these international laws as rules which obtain between equals rather than as commands addressed by a superior legislative will to persons who are conceived of as subject to its control.

Even when, by formal treaties, independent states have established rules by which, with reference to the matters specified, their future dealings with one another are to be regulated, there has been no creation of law in a positive or Austinian sense, for, as to those matters, the contracting parties remain subject only to their own wills and not to that of an outside or foreign power. As Jellinek briefly puts it: "Der Staatenvertrag bindet, aber er unterwerft nicht."[2]

Bearing in mind what has gone before, we may now ask: In what sense, if any, may we carry over into the international field the juristic conceptions of the state and of law which we have found to be fundamental in constitutional jurisprudence? The answer must be that these concepts cannot be so transferred.

It would plainly appear that the idea of sovereignty as it is found in constitutional law can find no proper place among international conceptions. The word, is, indeed, generally used in the literature of international jurisprudence, but, when thus employed, it has a meaning which is so different from that which it has in the constitutional field that it is most unfortunate that it should ever have obtained this currency. It would have been far better if some such term as "independency" had been employed. This word far better than "sovereignty" would indi-

[2] *Gesetz und Verordnung*, p. 205.

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cate the fact that, regarded from the point of view of positive law, complete individualism prevails in the international field. Socially, economically and morally they may be a family of nations, but, looked at with the eyes of the law as defined by the constitutional jurist, international life is atomistic, non-civic, individualistic. From this point of view nations are, as individuals, in that "state of nature" in which Hobbes and Rousseau, and the other natural law writers placed primitive man. This being so, in order to build up a science of international relations, it is necessary to begin with a conception of the state that will correspond to the conditions to which it is to be applied.

From the nature of the case this conception must be something different from that of the constitutional state. Like the constitutional state it must be viewed as a political person or entity possessing and expressing a will of its own and operating through an instrumentality termed a "government." But this will cannot be conceived of as a legal will, nor as a will supreme over the other state-persons to whom it is addressed. And, of course, the expressions of its will, whatever actual force they may have behind them, cannot be regarded as laws in a strictly juristic sense. So different, then, are these two fields of constitutional and international law, that nothing but confusion can result from an attempt to employ concepts in the one field appropriate only in the other. Especially does it seem desirable that the strictly legal concept of "sovereignty," which constitutes the fundamental idea in constitutional jurisprudence, should not find a permanent lodgment in international terminology. Its inappropriateness is shown, if in no other way, by the necessity which those who thus employ it find themselves under to make use of such obviously self-contradictory terms as half- or semi-sovereignty, and part-sovereignty.

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DISCUSSION

ROBERT T. CRANE

University of Michigan

In his admirable analysis of the juristic theory of the state, Dr. Willoughby has said that "analytical political philosophy" views the state "simply as an instrumentality for the creation and enforcement of law." The point of view from which this philosophy proceeds is thus fixed. It is professedly the legal point of view.

It is, however, precisely by peculiar and distinctive points of view from which phenomena are observed, that sciences or philosophies are differentiated one from another. Two philosophies cannot occupy the same standpoint. If there is to be discussion of a philosophy of politics which asserts its viewpoint to be that of a philosophy of law, then it is necessary to define very clearly the relationship between politics and law.

As these concepts have been defined by the analytical school, it is obvious that they are intimately connected. By the opponents of this school it may be objected that, when correctly conceived, politics and law are perfectly distinct. It may perhaps be held that what is known as law in modern society is not essentially political at all; but that it has merely happened as an accident of modern political development that a part of the law has received the additional and nonessential sanction of political authority.

The latter may be the proper conception of law. If so, the analytical jurists are dealing with only a part of the rules of human intercourse with which their opponents are concerned. And they are dealing with that part from a different point of view. But at least they are dealing with a distinct part. Its distinguishing aspect is the political sanction. And by this aspect, discernible from but a single point of view, there is given

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to particular rules the unity of a system. That point of view may or may not properly be termed legal. That is a matter of terminology. At all events it is a definite point of view. And since it is from this vantage point that the analytical theory is evolved, it must be accepted as the basis of this discussion. Consideration of any other conception of law is irrelevant.

Although the analytical concepts of politics and law are thus closely connected, it does not necessarily follow that they must be identical. One may be more comprehensive than the other.

There can be no question but that some of the analytical school have made politics and law practically synonymous. Lawmaking has been treated as not only the characteristic function of the state but as if it were its sole primary function. All other activities have been treated as subsidiary, as themselves pure products of legislation. The executive, administrative and judicial functions, the welfare activities of the state, the conduct of foreign relations have been treated as mere emanations of the lawmaking faculty. Legislation has engulfed all other powers. The analytical conception of law has been thought to determine the nature of all other political concepts. The analytical explanation of law has been deemed in itself a full and perfect explanation of the whole of politics.

The juristic theory of the state need not, however, be considered in this extreme form. As interpreted by Dr. Willoughby, it makes no claim to offer a complete philosophy of politics. Indeed it is expressly denied by him that its point of view embraces the origin, end, scope, justification, or nature of political authority. Since all these aspects fall within the scope of political philosophy, the viewpoints of law and politics cannot in fact be identical.

It is apparent, then, that the analytical theory as stated in its more moderate form by Dr. Willoughby assumes the legal viewpoint to be a section of the broader political point of view. The standpoint is the same, but law has a narrower outlook. It views but a portion of political phenomena. As thus stated, the juristic philosophy does not seek to reduce to one comprehensive system the entire range of political phenomena. It sets itself

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an humbler task. It deals only with a particular class of these phenomena. Its significance is limited to a single branch of politics.

Such a philosophy as the analytical philosophy is here argued to represent must by its very nature be a subordinate one. It finds its viewpoint already fixed for it, leaving in question only the width of its angle of vision. That fixed viewpoint defines the essential nature of all things political. Hence the analytical philosophy must accept many fundamental concepts as already defined for it by the broader general philosophy of politics. It may add new concepts of its own, or may join new elements to old ones. From independent determination of all of its own concepts, as if it were a distinct science, it is debarred. It cannot erect any concept inconsistent with a sound general theory of politics. Its whole erection is a superstructure which can rest only on a predetermined basis established by a more general philosophy.

Dr. Willoughby has said of the analytical philosophy that "it takes political institutions as it finds them." Again he says of this philosophy that it does not "seek substantive truth;" but that it "is a purely formalistic inquiry." It attempts, that is, only to explain how a particular rule of conduct acquires the peculiar form which it denominates legal. It does not attempt to explain how that rule acquires its substance.

The analytical philosophy, then, is only (in Dr. Willoughby's phrase) "an apparatus of thought"—for creating an internal consistency within a group of formal rules. It relates these formal rules to the source of their form and hence to each other. This apparatus works only within a closed circuit. It moves only from the form to the source of the form and back again. The source of the form is the sovereign; the giving of the form is the peculiar faculty of the sovereign which is called sovereignty; the rule to which the form is given is law; the human beings affected by such formal rules are the collective people; and the unit of which these concepts are the elements is the state. These are all formal concepts. The analytical philosophy is concerned throughout with aspects of form, not of substance.

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This formalism of the analytical school is unacceptable to many minds. It is objected that its theories do not square with the actual facts of political life. The ground on which this objection is based could not be more clearly stated than by Dr. Willoughby. He has deduced with inexorable logic from the analytical theory the corollary that the human individuals who are the subjects of a state are determined by a mere exercise of the lawmaking power. Any state may by a simple fiat of the sovereign make every inhabitant of the globe its subject. With equal logic it follows that in precisely the same territory and over precisely the same individuals there may exist two or more sovereignties or states.

Such conclusions seem repugnant to common sense. A sovereignty that rests upon a mere formal assertion seems totally lacking in reality. It is an empty form, a form without substance. If logic leads to the deduction from the analytical theory that the entire population of the world can be embraced in the people of a state by a mere fiat of the sovereign, that theory can hardly be said to square with a sound general theory of politics.

This objection appears to rest on solid ground, and calls for some amendment of the analytical theory. The particular request of the program committee that this discussion should offer a substitute for the analytical theory, must be the excuse for suggesting a modification of that theory to obviate the objection just stated.

The analytical school has always treated law as a kind of "command." It has said a law is a command from the sovereign to the subject. Apparently because it is conceived that a command can proceed only from volition, this theory therefore predicates a "will" in the state. Since will is an element of personality, the state must necessarily be a "person." As a person, it differs from other persons in that its will is supreme. Hence it may make of whomsoever it chooses its subject.

This whole structure rests upon the assumption that a law is a command to subjects. Is this conception necessary to the analytical theory? Is it not possible, on the contrary, to regard law (in the analytical sense) as not addressed to subjects at all? The

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supremacy of the law considered as commands to subjects would seem impaired, despite the denials of the analytical school, by the fact of constant disobedience, by the fact that it is often actually unknown to the subjects, and by the fact that it may logically be extended to persons who have never heard, and perhaps never will hear, even of the existence of the exercising state.

Is it not correct to consider law in the analytical sense, not as a command to a subject, but as a mere statement of cause and effect, somewhat like a natural physical law? The Mosaic law said "Thou shalt do no murder." But this was conceived as a command from a personal God. A law in the political sense does not usually enjoin one to refrain from anything. It is more apt to run: "Every person convicted of murder shall suffer the penalty of death." This is not a command to refrain from murder. It is a statement of a consequence which will follow murder like the operation of a physical law. It will follow, like such a law, whether or not its existence is known to him who incurs the consequences. Like such a physical law, again, its operation may be nullified by the employment of counteracting forces. It treats human individuals as the subject matter within which it operates, not as subject intelligences to which it is addressed.

Such a conception of law does not take from it the character of a command. Only the command is now not to the subjects. It is a command to the agents of the sovereign. It still proceeds from a will. But there is no necessity of predicating a will of the state. It is a command from one concrete individual or group to another. It is a mere expression of the internal organization of the government.

Law, as thus conceived, is addressed by the sovereign to its own agents. To these it is, as a matter of actual fact, supreme. In so far as they fail to observe the provisions of the law, they are not acting as agents. Nor can any one else violate the law in this formal sense any more than it is possible to violate a physical law of nature; simply because the law is not addressed to any one else but is a mere formulation of conditions and consequences.

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Only by shifting the incidence of the command from the subjects to the governmental agencies, can the assertion of the analytical school that the whole world may be made subject to any state by the mere fiat of its law be reconciled with fact. Only with such an alteration of the incidence of the command, does it seem possible to agree with Dr. Willoughby when he says: ". . . . all persons, whatever their other political relations and affiliations, are potentially subject to the legal control of a given state. That is, it is possible by a mere exercise of its sovereign will to bring them within a control, the legal validity of which its own courts cannot question." That seems to be a statement of the very conception here contended for—that the essence of law in the formal sense of the analytical school is that it is binding upon the courts (and other agencies) established by the sovereign.

The conclusions to which this argument leads are that the analytical theory has been carried far beyond any legitimate scope, that it needs critical restatement, but that it unquestionably has a legitimate sphere of validity and utility.

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THE BACKGROUND OF AMERICAN FEDERALISM

ANDREW C. McLAUGHLIN

University of Chicago

The purpose of this paper is to make plain two facts: first, that the essential qualities of American federal organization were largely the product of the practices of the old British empire as it existed before 1764; second, that the discussions of the generation from the French and Indian war to the adoption of the federal Constitution, and, more particularly, the discussions in the ten or twelve years before independence, were over the problem of imperial organization. The center of this problem was the difficulty of recognizing federalism; and, though there was great difficulty in grasping the principle, the idea of federalism went over from the old empire, through discussion into the Constitution of the United States. By federalism is meant, of course, that system of political order in which powers of government are separated and distinguished and in which these powers are distributed among governments, each government having its quota of authority and each its distinct sphere of activity.[1]

We all remember very well that, until about thirty years ago, it was common to think of the United States Constitution as if it were "stricken off in a given time by the brain and purpose of man." About that time there began a careful study of the background of constitutional provisions and especially of the specific make-up of the institutions provided for by the instrument.[2] It is probably fair to say that the net result of this investigation was the discovery that the Constitution was in marked degree

[1] This paper is limited to the subject stated above. It does not pretend to assert or deny economic influences. It confines itself to the intellectual problem of imperial order. Only one other subject vies with this in importance—the problem of making real the rights of the individual under government.

[2] The first of these studies, as far as I know, was Alexander Johnston's "First Century of the Constitution" in the *New Princeton Review*, IV, (1887), 175.

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founded on the state constitutions, and that they in turn were largely a formulation of colonial institutions and practices; the strong influence of English political principles and procedure was apparent, though commonly that influence had percolated through colonial governments and experiences.

In such studies as these just mentioned, we do not find, nor have recent works furnished us, any historical explanation of the central principle of American federalism.[3] And still, one may well hesitate to give the historical explanation, because, when stated, it appears as obvious as it is significant. No better occasion than this, however, is likely to arise for acknowledging the fact that out of the practices of the old empire, an empirical empire, an opportunistic empire, an empire which today is seeking formulation in law or in public acknowledgment of institutional coördination, an empire which the Englishmen even of a century and a half ago did not understand—no better time than now to acknowledge that to the practices of English imperialism we owe the very essence of American federalism. It is a striking fact that there are two great empires in the world: one the British empire based on opportunism and on the principles of Edmund Burke; the other the American empire based on law, the law of imperial organization. The first of these, an empire without imperial law, was profoundly influenced by the experiences of the American Revolution and by slowly developing liberalism; the other—an empire with a fundamental law of coördination, also influenced by its experiences and by Revolutionary discussion—institutionalized and legalized, with some modifications and additions, the practices of the prerevolutionary imperial system of Britain.[4]

If we go back to the old empire as it was, let us say in 1760, we find that it was a composite empire, not simple and centralized.

[3] One of the books which does in some degree recognize the nature of the Revolutionary discussion is Holland, *Imperium et Libertas*.

[4] So successful has been the empire of opportunism, of operation and coöperation based on understandings, not on fixed law, that we find ourselves looking with some misgiving on discussions now in progress at Westminster, lest, through well intentioned effort to reach definiteness, fluidity be changed to rigidity.

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We are not speaking of any theory of the law of the empire but of its actual institutions and their practical operation.

First: The active instrument or authority of imperial government was the crown. It operated of course most immediately and effectively in the royal colonies. It operated by the appointment of some officials, by instructions, and by disallowance of colonial acts. The generalization is probably just, that instruction and disallowance were exercised chiefly for essentially nonlocal, imperial purposes, the maintenance of the character and aim of the empire. The process of review of cases appealed from the colonies can probably be similarly classified—its operation was for homogeneity in part but substantially for imperial purposes. This central authority of the empire had charge of foreign affairs, navy and army, war and peace, subordinate military authority being left to the individual colonies.[5] It managed the post office; it was beginning to take charge of Indian affairs and trade with the Indian tribes; it had charge of the back lands and of crown lands within the limit of the colonies; it was preparing to take in hand the building up of new colonies (our territorial system); it exercised executive power in carrying out the legislation of Parliament which was chiefly concerned with trade and navigation.

Second: Parliament had legislated little if at all for strictly local internal affairs of the colonies. If we omit for the moment acts of trade and navigation, we should find the act making colonial real estate chargeable with debts, the post office, the Naturalization Act of 1740, the Bubble Act, the act against the land bank, the act against paper money. Each one of these acts was of imperial scope or nature, because it was directed against an evil of more than local extent, or because, as in the case of the post office, it was of more than local interest. The acts of trade and navigation were in some instances, for example the act against the smelting of iron, a somewhat rude intrusion

[5] Working out the principle of federalism in military affairs was a big problem in the French and Indian war, in the decade before independence, in the Revolution, in the Federal Convention, in the War of 1812, in the Civil War, in the Congress of 1916, in the War of 1917.

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upon the sphere of local action; but to see these things properly, we must associate them together with the general policy of mercantilism, and see them as a part of a system, not always wisely developed, of making a self-sustaining empire. On the whole, Parliament, as was perfectly natural, had to a very marked extent interested itself in regulation of trade; it was perfectly natural that the empire as far as Parliament was concerned should have been largely a commercial empire; the part played by mercantilistic doctrine in the seventeenth and eighteenth centuries made such parliamentary interests and activities inevitable.[6]

Third: The colonies managed their own "internal police," some of them under charters, all by governments in which there were representative assemblies. They levied taxes for local purposes, and voluntarily contributed, after a wholesome or a ramshackle manner, to the defense of the empire. They managed local trade, and in short did the thousand and one things—sometimes under pressure from the representatives of the royal prerogative—that concerned the daily life of the colonist.

Any one even slightly familiar with American constitutional system will see at once that to a very marked degree we have here the distribution of powers characteristic of American federalism. In fact if we add to the powers of the central authority in the old empire the single power to obtain money by direct or indirect taxation immediately from the colonists for imperial purposes, we have almost exactly the scheme of distribution of our own constitutional system.[7] Of course there had

[6] I have left out of consideration the question of the absorption by the colonies of common law and the acceptance of legislation modifying common law, especially criminal law. It is a big and complicated question. Limited space does not permit the treatment. I content myself with a general picture of the make-up of the empire, which I believe is substantially correct. It is also noteworthy that there was in the empire national or imperial and local citizenship, and that naturalization by colonial authorities was after 1740 under imperial law.

[7] The reader may object that Congress can now provide for standards of weights and measures, patents, and copyrights. He might point out, possibly with justice, that coining money and regulating the value thereof did not belong in the old empire to the central authority; but I leave the old practice to justify my assertion and refer again in passing to the act against paper money. The bankruptcy power, as a part of the general power of our central government, probably can be traced back with certainty at least to colonial conditions, and the Bubble Act and its extension to the colonies must not be forgotten.

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to be found a thorough working legal basis and a legal method of operation. The legal basis was found when the constitutional convention of 1787 declared that the Constitution should be law. The operation of the central government directly upon its own citizens, a most important quality of our own federalism, probably came in part from the old empire, but was distinctly worked out in the debates of the convention.

If any one wishes to criticize unfavorably some detail of the scheme of empire which has just been sketched, he will still scarcely deny that Britain had a working federal empire by the middle of the eighteenth century. If Great Britain, in 1760, had reached out and said, "this is the law of the empire; thus the system is formed," she would have seen herself as the most considerable member of a federal state based distinctly on law and not on practice alone. If Britain by a formal constitution could have formulated the empire she had, if the imperial order could have been frozen, petrified, in the form that time had made for it, the British empire would have been legally a federal empire. But though she did not, she made her contribution; her imperial history had selected and set apart the particular and the general, according to a scheme which was of lasting significance in the development of American imperial order. On that general scheme of distribution the Constitution of the United States was founded.

Let us now discuss this subject more in detail and with some consideration for chronological sequence, with some deference, that is to say, to the order and time in which events occurred and arguments were put forth. The scheme of imperial order presented by the Albany congress is so well-known, that it does not need extended comment; it is of interest as a plan for redistribution of powers in certain essential particulars and it is of lasting significance as an effort to select certain things of extra-colony rather than intra-colony importance, those things which needed general control by a colonial representative body. It tried chiefly to solve the problem of imperial order as far as that centered in the need of securing men and money for imperial security; and for the time the plan failed.

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This matter of imperial security, augmented in weight by the experiences of the war, became the center of dispute in the decade or so after the peace of 1763. Could England by parliamentary enactment secure money for imperial defense? While this question was the center of dispute, the discussion was soon narrowed, or, if you like, broadened, to this: Did the colonies, as constituent parts of the whole, possess certain indefeasible legal rights and especially the right to hold on to their own purse strings? The dispute was narrowed because it came to be confined to the field of theory; it was not a question as to whether Parliament could get money from the colonies but whether they would acknowledge the abstract legal right to get it. The dispute was broadened, because it involved the whole question of interdependence and relationship.

Any amount of argument over the theoretical legal right to exercise sovereignty in the empire does not get one very far. There is no great practical value in trying to determine whether the colonies by the principles of English law were subject to taxation by Parliament. It may not be amiss, however, to point out that most of this argument, as far as it seeks to make out that Parliament did have the taxing power, whether that argument was made in 1765 or in 1917, has for its basis the constitution of the island and not that of the empire. It is largely insular argument, based on insular experience and founded on insular history. The unwritten constitution of the empire is the other way, and that is just what the men, especially the Englishmen, of a hundred and fifty years ago could not see. They could not think and talk imperially, when it came to a matter of constitutional law. If the practical working empire of 1760 had been frozen into recognizable legal shape, the right to tax the colonies would not have been within the legal competence of Parliament, even as an imperial legislature. And because the Englishmen did not think imperially, because they did not realize that time had wrought out for them a composite federal empire, because they insisted on the principle of centralization in theory, they failed patiently to set about the task of determining some way by which, while recognizing federalism and colonial integrity, they could on a basis of justice and consent obtain authoritatively

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an acknowledged legal right to tax for strictly imperial purposes. Men that could not comprehend federalism, who denied the possibility of its existence, were incapable of dealing with a crisis of an imperial system in which federalism already existed.[8]

Some one may say, and with considerable justice, that the colonists were also incapable, quite as incapable as the parliamentarian and the British pamphleteer, of understanding the nature of a composite empire. It long remained true as Franklin said in disgust after the failure of the Albany plan: "Everybody cries, a Union is absolutely necessary, but when they come to the Manner and Form of the Union, their weak noddles are perfectly distracted."[9] That was the trouble—weak noddles. But, withal, the idea was hard to grasp, simple as it may appear to us; and it took the discussions and experience of a generation to find the manner and form of imperial order, though, when they did find it, it was the old scheme only in part modified, representing in its method of distributing powers the familiar practices of the empire.[10]

[8] This statement needs modification; for Burke, rejecting legalism, still displayed statesmanship of the highest order. He resented any attempt to fossilize or ossify the empire and sought to hold out the idea of parliamentary duty rather than legal power. In these latter days it would be stupid to declare that one must grasp and apply legal federalism if he is to deal with the elements of a composite empire; Burke's principles of duty and of freedom have been proved to be the cement of the British empire. But, withal, it is quite plain that the statesmen of the Revolution on both sides thought there was need of fixing legal authority; and those incapable of seeing the principle of distributed authority—federalism—were in a bad way.

[9] *Writings*, ed. by A. H. Smyth, III, p. 242.

[10] It is worth noticing that at a later time Franklin himself after reading a considerable portion of Dickinson's *Farmer's Letters* is evidently at a loss; and he at a comparatively early day, about 1768, found no middle ground between complete independence of the colonies and complete power of Parliament. Speaking of the *Farmer's Letters* Franklin wrote: "I have read them as far as No. 8. . . . I am not yet master of the idea they and the New England writers have of the relation between Britain and her colonies. I know not what the Boston people mean by the 'subordination' they acknowledge in their Assembly to Parliament, while they deny its powers to make laws for them, nor what bound the Farmer sets to the power he acknowledges in Parliament to 'regulate the trade of the colonies' it being difficult to draw lines between duties for regulation and those for revenue; and if the Parliament is to be the judge, it seems to me that establishing such principles of distinction will amount to little." Quoted in note in *Memoirs of the Historical Society of Penn.*, XIV, 281.

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And yet it is not quite correct to say that colonial noddles utterly failed. It is true that the colonists often spoke as Englishmen, they claimed rights as Englishmen, they, too, argued on the basis of insular law; and indeed the principles of insular law were not at variance with the rights which they set up as citizens in the empire. But some of them went further, and defended the rights of the colonies, as distinguished from the rights of Englishmen; they defended, to use later phraseology, states rights as distinguished from individual rights; they argued from the structure of the empire rather than from the principles which aim to protect the individual from governmental wrong. As far as they did this, they grasped the nature of an imperial system in which the outlying portions had their own indefeasible share, legal share, of political authority.

If there were space to examine critically the whole mass of constitutional arguments, we should see a groping after the idea of classification of powers, and on the other hand the emphatic declaration that to deny to a government the right to make any particular law or any special kind of laws is to deny all power and authority—government must have full sovereign power or none. In examining some of the materials throwing light on the nature of the arguments, it will be well on the whole to exclude those assertions from which we can gather only inferentially that the writer or speaker grasped the principle of differentiation. As we have already seen, the Albany plan was distinctly based on the idea of classification and distribution. The controversy of 1764 regarding the revenue act brought out occasional indications that certain distinctions were close at hand, if not as yet fully comprehended; at least there was a recognition of the old exercise of power over trade and an objection to the newly proposed schemes of revenue. In the main, however, the American opposition at that time was not clearly and precisely directed against taxation because it violated a principle of imperial structure, but rather because it violated a principle of English personal liberty. Otis, in his *Rights of the Colonies Asserted*, denies the authority of Parliament to tax, and admits their right to regulate trade; but his argument against taxation is English not imperial argument,

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on the whole. It is probably safe to say he relied on personal right rather than on the principles of empire.[11]

Still in these early days of 1764 and '65 certain fundamentals did appear, even when lines were not drawn with the precision of later days. Dulaney recognized a supreme authority in Parliament to preserve the dependence of the colonies; he spoke of the subordination of the colonies, which still however retained rights despite their inferiority; for "in what the Superior may rightly controul, or compel, and in what the Superior ought to be at Liberty to act without Controul or Compulsion, depends upon the nature of the dependence, and the Degree of the Subordination."[12] He suggests that a line may be drawn "between such Acts as are necessary, or proper, for preserving or securing the Dependence of the Colonies, and such as are not necessary or proper for that very important Purpose."[13] He thus clearly points to the possibility of an empire managed in the large by a central authority but in which the outlying parts are possessed of indefeasible authority on subjects belonging of right to them, subjects which do not contravene the general superintending power lodged in the central authority. He naturally dwells on those particular exercises of authority then under dispute, and declares that there is "a clear and necessary Distinction between an Act imposing a Tax for the single Purpose of Revenue, and those Acts which have been made for the Regulation of Trade, and have produced some Revenue in Consequence of their Effect and Operation as regulations of Trade."[14] This pamphlet of Dulaney's was a states-

[11] This interpretation of Otis is of course strengthened by the fact of his belief in the representation of the colonists in Parliament and his reliance on the right of a court to declare an unjust act void; but, after all, Otis did distinguish between powers, and did believe in the constitutional restraints on Parliament.

[12] *Considerations on the Propriety of Imposing Taxes in the British Colonies for the purpose of raising a revenue, by act of Parliament,* (London, 1766), p. 16. Tyler says that there was an American edition of 1765. This I have not seen.

[13] *Ibid.*, p. 17. See for an early statement of federalism, Ann Maury, *Memoirs of a Huguenot Family,* 425–426; letter of Maury to Fontaine, December 31, 1765. Portions of Patrick Henry's resolutions of 1765 have the federal argument.

[14] *Considerations on the Propriety of Imposing Taxes in the British Colonies,* etc., (London, 1766), p. 46.

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manlike production, and contained at least the foundations for the conception of federalism.[15]

Unhappily in 1766, Franklin in his examination before the committee of commons does not indulge in clear and precise thinking. Had he then enlarged on the character of the imperial structure, and had he sharply drawn the lines of demarcation between imperial superintendence and colonial legal right, possibly the listening commons might have understood the vital distinctions. Franklin's examination admirably discloses the opportunistic and nonlegalistic nature of his statesmanship. In this examination he does, of course, emphasize the colonial objection to revenue acts; but he became hopelessly confused in discussing the basis for trade regulation, and impressed on his listeners that what was objectionable was internal taxation as distinguished from external; he appears to have impressed this distinction so firmly, that the Englishmen never lost the notion that it was peculiarly dear to the American heart; and, when within a year or two external taxes were levied, the English administrators were hurt in their minds by the prompt rejection of their schemes. It is true that Lyttleton (1766) called the attention of the lords to the fact that the Americans made no such distinction and that it could not be found in Otis's pamphlet;[16] but the idea seems to have persisted, aided probably by the loose use of terms by occasional American writers.

It was partly to clear up such confusion as this and to draw the line properly, that John Dickinson penned his *Farmer's Letters*. The thinking of Dickinson was plain, straightforward and able. Possibly in his first letter he enters upon indefensible ground; for, having in mind the effort to compel the New York legislature to furnish quarters for troops and thereby to incur certain expense, he insists that an order to do a thing is the imposition of a tax. But in no other place does he become

[15] See also Stephen Hopkins, *Grievances of the American Colonies Candidly Examined*, p. 19.

[16] "Mr. Otis, their champion, scouts such a distinction." *Parl. Hist.*, XVI, col. 167.

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entangled in dubious assertions.[17] Dickinson spoke as an imperialist, as one who saw and felt the empire; he is hardly less emphatic in his declarations concerning the imperial power of Parliament and the existence of a real whole of which the colonies are parts, than in defending the indefeasible share of empire which the colonies possessed. Hitherto the colonies, save as they had been restrained in trade and manufacture by parliamentary legislation under the general principles of mercantilism, had been regulated even for purposes of empire largely by the exercise of the royal prerogative. Dickinson realized the necessity of parliamentary control and guidance; he saw as did Dulaney the need of a superintending authority, and he openly acknowledged that it lay with Parliament. It was perfectly inevitable that a statesman—colonial or English—should think of the control of trade as the big duty, and thus Dickinson emphasized that duty and the right of Parliament to direct the trade of the whole system. He saw an empire, composite and not simple or centralized, with a Parliament possessed of indubitable power to maintain the whole and chiefly to look after the interests of the whole by the regulation of trade.[18]

It was just because Dickinson was thinking imperially and was doing more than to acknowledge that Parliament might regulate trade, that his words deserve especial weight. He was not speaking as a disgruntled colonist merely finding fault; he was not setting up purely insular constitutional principles; he was not talking as a frontier individualist; he saw the existence of an imperial reality and he presented strongly certain principles of imperial structure. He denied that Parliament had the right to tax; scouting the supposed distinction between internal and

[17] For a sharp statement of Dickinson's position of empire consistent with colonial freedom—freedom of the colonies—see the early parts of Letter II of the *Farmer's Letters*.

[18] The distinction between regulation of commerce and taxation never, I think, entirely disappeared from the colonial mind, though after about 1772 some leaders came to the point of openly asserting complete freedom from parliamentary control. See for the distinction *Letter from the Massachusetts House to Dennis de Berdt*, (London, 1770), p. 16. It is possible that this letter was written earlier than 1770. I have been unable to find it in the *Mass. State Papers*.

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external taxation, he openly admitted the authority of Parliament to regulate trade.

Taxation is an imposition for the raising of revenue; it at times seems strange, not that Dickinson should have made the distinction between taxation and regulation, but that men at all experienced with actual practices of the empire and familiar with mercantilistic doctrine should not have readily accepted it. That distinction had been touched on before Dickinson wrote; but he made the thing so evident that men ought to have been able to see it. Still it is not plain that men did see it. At least they were not quite able to see that he was proposing not only a perfectly valid distinction between powers, but a real theory of imperial structure. Consequently Dickinson's words did not have the weight they deserved in pointing the way to composite empire, an empire in which there was an indefeasible participation of the parts under a government charged with the maintenance of the whole. Federalism, we must remember, necessitates singling out of specific branches of authority, which we commonly call "powers." Nothing is simpler in the primer of our constitutional law than the distinction between the taxing power and the power to regulate interstate and foreign commerce. Any person, though he be unlearned in jurisprudence, will talk glibly of the commerce power, the treaty making power, the taxing power and many other powers, fully realizing that we take certain authorities of government and label them, put them in certain receptacles, and leave to our astute courts the duty of deciding whether a legislative act is to be classified thus or so and whether it is a due exercise of "powers" that have been authoritatively granted. And so it is amazing to us, this difficulty in seeing the validity of this most commonplace distinction, and that writers should still think Dickinson was speaking in confusion instead, as was the fact, talking the A, B, C of American constitutional law.

Dickinson's position distinguished the power to regulate trade from the power to tax. The distinction deserves to be called proper, because we have had it in active operation under our Constitution for a century and over. But it was proper also,

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because it carried on the practices of the old empire. Parliament had regulated trade; it had not taxed. For a century or more the empire had acknowledged in practice, not to speak of in charters and commissions and instructions, the existence of colonies with the authority to tax for local concerns, and had refrained from taxation for imperial purposes. To a marked degree we may say again the empire was a commercial empire. Its commercial purposes were expressed in navigation acts, and a large portion even of the administrative control by the Royal council had been directed to the support of those enactments and that commercial policy.

Before passing on to other and particularly later appreciations of federalism, let us turn to the other side of the matter. Englishmen, whether they defended the colonists or opposed them, were likely to take refuge in insular (i.e., English) law, not discussing the question openly as to whether Parliament had become imperial, or whether, if it had, its power was unlimited; blank assertion took the place of argument.[19] They occasionally spoke learnedly or superficially of whether places without the realm could be taxed, or whether such places must be brought within the realm and given representation before they could be taxed; and thus, in referring to past conditions in the history of Britain, they really recognized the fact that even Britain herself had been a growth and had been compounded, but curiously enough they were blind to the composite empire already in existence and to the practices of a century. The freedom from taxation they discussed from the viewpoint of insular institutions, and, as the world knows, made the ludicrous blunder of attempting to impute the insular system of representation to the whole empire. They fumbled with the whole principle of representation; but their chief error was the insistence on applying to the whole empire certain rigid principles which they believed were logically irrefutable. Scarcely any one of them

[19] Special exceptions should of course be made. Thomas Pownall, in his *Administration of the Colonies* (London 1764 and later amplified editions), struggles to find expression. Of course there were others. Vide, for example, *Johnstone's Speech on . . . . recommitting the address*, etc., (London, 1776).

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saw that, in the development of empire, had arisen new principles of law and organization. Of course they rejected the distinction between internal taxation and external taxation, as there may have been reason for doing on practical as well as theoretical grounds; from the beginning they denied the possibility of classification of powers; they asserted the indivisible character of legislative power, and almost at once took a position which, if insisted on in practice, left nothing to the colonists but a choice between acceptance of an absolute government at the head of a centralized empire on the one hand, and the total denial of all parliamentary authority on the other.[20]

The pamphlet entitled *The Controversy Between Great Britain and her colonies*, commonly attributed to the pen of William Knox, probably deserves the praise bestowed upon it as being the best presentation of Britain's case.[21] It is true that in one flagrant instance it falsely juggles with Locke's second essay, and it shows more than usual cunning in making Locke's theories support governmental authority; but the argument from the history of Parliament and the empire to support the claim for imperial authority is able and has the strength of historical statement as contradistinguished from bald assertion and adroit legalism. Knox, however, has a merry time with Dickinson, proving to his own satisfaction the folly of distinguishing between taxation and regulation of commerce; and he thus fails utterly to see anything but a centralized empire with all authority in Parliament. "There is no alternative: either the colonies are a part of the community of Great Britain, or they are in a state of nature with respect to her, and in no case can be subject to the jurisdiction of that legislative power which represents her community, which is the British Parliament." Nothing could more fully discredit legalism when dealing with a practical problem of statesmanship; this was denying that Parliament could not recognize the illegality of doing what in practice it actually had

[20] Pitt's statement distinguishing taxation from legislation is omitted from this discussion in the text. See for partial support of position above Grenville, Speech of January 14, 1766. *Parl. Hist.*, XVI, 101. See also *Ibid.*, 167.

[21] Except Hutchinson's speeches of 1773.

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not done and what the passing years were proving it could in reality not do.[22]

Even before 1770, many American opponents of parliamentary taxation had been hurried along to the position in which they denied that Parliament possessed any power over them.[23] It would appear, however, that the more sober-minded did not as yet openly go so far; it was easy for the thoughtless to resent British assertion of authority by the simple denial of all authority. There is no such declaration, however, in the American state papers. There was still readiness, as there continued to be after 1770, to acquiesce in British regulation of the trade of the empire, and in such royal control as was consistent with practice and the charters.

In 1770 when the long controversy arose between Hutchinson and the Massachusetts legislature over the right to remove the legislature to Cambridge, Hutchinson declared that the Boston men, having denied the power of Parliament over them, were now prepared to deny the power of the crown. It is perfectly true that that controversy concerned the power of the crown; it involved the question whether the prerogative could be used freely and arbitrarily and in disregard of established laws and the charter; but certainly till that time the colonists had not committed themselves to the doctrine that Parliament was totally powerless, nor did they then deny *in toto* the authority of the crown. As before 1770 they had asserted that there were bounds to the authority of Parliament, so now they rejected the notion that sufficient excuse for a governor's acts was his simple declaration that he had received orders from Westminster. Even in the exercise of the prerogative, there must be recogni-

[22] In a pamphlet attributed to Phelps, *The Rights of the colonies and the extent of the legislative authority of Great Britain briefly stated and considered*, (1769), pp. 11 and 12, we find: "The colonies, therefore, must either acknowledge the legislative power of Great Britain in its full extent, or set themselves up as independent states; I say in its full extent, because if there be any reserve in their obedience, which they can legally claim, they must have a power within themselves superior to that of the mother country; for her obedience to the legislature is without limitation." Winsor says Phelps was Under-Secretary to Lord Sandwich. *Narr. and Crit. Hist.*, VI, 85.

[23] See for example J. K. Hosmer, *Life of Thomas Hutchinson*, 134.

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tion of the legal entity and the legal competence of the colony as an integral portion of an integral empire; that was the position of the Massachusetts legislature translated into modern terms.

Students of the Revolution that believe the movement was economic in origin, character and purpose, may not deny that, after 1768, Parliament had no express hope or intention of obtaining revenue from America. From that time on, British interest was largely, if not wholly, confined to asserting parliamentary omnipotence, or, if this seems too strong, confined to an insistence upon the supreme power of Parliament and to resisting what they believed, under the tutelage of American governors, was a conscious tendency toward independence. Indeed, especially after 1768, but to a considerable extent from 1766, the question was not so much whether the colonies would pay taxes as whether they would acknowledge the legal obligation; and to an amazing extent the conflict was over the existence or nonexistence of an abstract right. As we have already seen, much of the colonial argument was in defense of individual liberty, not of states rights; but the center of the controversy was whether or not Parliament was possessed of limitless authority.

The colonists at least claimed to be satisfied with the old régime, in which power had been divided, and in which Parliament had chiefly shown its power by the regulation of trade.[24] The parliamentarians insisted that in the law of the empire the will of Parliament was nothing more nor less than supreme and

[24] "Every advantage that could arise from commerce they have offered us without reserve; and their language to us has been—'Restrict us, as much as you please in acquiring property by regulating our trade to your advantage; but claim not the disposal of that property after it has been acquired—Be satisfied with the authority you exercised over us before the present Reign.'" *Additional Observations on the nature and value of Civil Liberty, and the War with America*, by Richard Price.

"And when men are driven for want of argument, they fly to this as their last resource—'acts of parliament (say their advocates) are sacred, and should be implicitly submitted to—for if the supreme power does not lodge somewhere operatively, and effectually, there must be an end of all legislation.'" *Lord Chatham's Speech on the 20th of January, 1775.* Taken by a member, page 9, (1775).

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all-inclusive. The colonists insisted, though they did not use this phraseology, that old practices of the empire were the law of the empire and thus, in modern phraseology, they demanded the recognition of a composite empire based on law. Even if we admit the presence of many economic and social forces, we find in actual conflict two theories of imperial order; and in this discussion after 1768, if not before, the English parliamentarians and pamphleteers were victims of certain dogmas of political science, curiously similar to the doctrine of indivisible sovereignty.[25] How often did Burke deprecate the continual harping on Parliament's authority, on the necessity of acknowledging the theoretical supremacy of Parliament![26] He deplored the common talk about the legal rights. Beyond Burke's speeches little needs be cited to show the essentially legalistic character of the whole discussion.

It may be rash to assert that the colonists were less insistent upon knowing what the constitution of the empire was than were

[25] "If, intemperately, unwisely, fatally, you sophisticate and poison the very source of government by urging subtle deductions and consequences odious to those you govern from the unlimited and illimitable nature of sovereignty, you will teach them by those means to call that sovereignty itself in question. When you drive him hard the boar will turn upon the hunters. If that sovereignty and their freedom cannot be reconciled, which will they take? They will cast your sovereignty in your face, nobody will be argued into slavery." Burke, Speech on American Taxation, *Works*, vol. II, p. 73. See also *Ibid.*, pp. 141–142, for Burke's wishing to see the colonies admitted to an interest in the constitution, an evidence that he too recognized in some measure the need of formal statement.

[26] An illustration of the same thing may be seen in an American source:

"Moreover, when we consider that Parliamentary taxations are not as to their present value, a matter of moment, either to the mother country, or the colonies; that the contention between us, is upon the points of principle and precedent; that it is not the quantum, but the manner of exacting our unconstitutional impost, which is the bone of contention, our public jealousies must necessarily be increased.

"When the taxation was more general, there was some colour for the assertion in the Revenue Act, that it was intended for the safety and defence of the colonies. But it is not only true, that this cannot be asserted of the paltry duty on tea; we know, we were assured by our enemies, that when the other articles charged by the Revenue Acts were exempted by the partial repeal, the duty on tea was left as a standing memorial of the right of Parliament to tax Americans." Force, *Archives*, Fourth Series, I, 256 note—copied from the *New York Gazetteer*, May 12, 1774.

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the Englishmen, though there seems no reason to doubt that the colonists would have willingly accepted the old practice as sufficient, if it were not threatened. Still, the colonists desired to know precisely what were American rights; and in this respect possibly America was more legalistic than Britain, because Parliament insisted on the existence of unlimited power—asserted, one might not unjustly say, that Parliament was above the law—while the colonists asserted that Parliament was bound by rigid law. "The patchwork government of AMERICA," wrote Bernard in 1765,[27] "will last no longer; the necessity of a parliamentary establishment of the governments of AMERICA upon fixed constitutional principles, is brought out with a precipitation which could not have been foreseen but a year ago; and is become more urgent, by the very incidents which make it more difficult." At this time, it will be remembered, he proposed an extraordinary Parliament, in which there were to be American representatives, which should form and establish "a general and uniform system of American government;" "and let the relation of America be determined and ascertained by a solemn Recognition; so that the rights of the American governments, and their subordination to that of Great Britain, may no longer be a subject of doubt and disputation." In 1766 he declares that "the Stamp Act is become in itself a matter of indifference; it is swallowed up in the importance of the effects of which it has been the cause. . . . And as the relation between Great Britain and the colonies has not only been never settled, but scarce even formally canvassed, it is the less surprising, that the ideas of it on one side of the water and on the other are so widely different, to reconcile these, and to ascertain the nature of the subjection of the colonies to the crown of Great Britain, will be a work of time and difficulty."

There can be little doubt that Bernard was right; the problem of the day was the problem of imperial organization: were Englishmen or Americans capable of finding a law of the empire?[28]

[27] *Select Letters*, p. 33.

[28] By "law" I do not mean that there was a demand for a parliamentary act; I mean at the least an evident understanding, at the most a formal acknowledg-

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If so, that law must be consonant with practical realities; it must be a formulation of the principles of relationship which recognized not centralization but distribution.[29] As an indication of the fact that men were discussing legal rights, and losing sight of financial returns, it may be sufficient for the earlier days to refer to the comments in the *Parliamentary History*[30] on the debate about the Circular Letter. It was insisted by opponents of the ministry in debate on the Massachusetts Circular Letter and in respect to the revenue laws "that the inutility of these laws was so evident, that the ministers did not even pretend to support them upon that ground, but rested their defence upon the expediency of establishing the right of taxation." And if we turn again to Dickinson, we find the same thing in a different guise—the necessity of law in the empire—not a law securing centralized authority but freedom. There could be no freedom without legal restriction: "For who are a free people? Not those, over whom government is reasonably and equitably exercised, but those, who live under a government so constitutionally checked and controlled that proper provision is made against its being otherwise exercised."[31]

ment of power and the extent of it, a formal recognition of the complete authority of Parliament or, on the other hand, of the width and depth of the actual colonial legal competence.

[29] It is plain, too, that Hutchinson, a legal-minded man, also felt in the days of Bernard's governorship, as later, that the constitution must be settled. "I wish to see known established principles, one general rule of subjection, which once acknowledged, any attempts in opposition to them will be more easily crushed." Letter of April 21, 1766, quoted in *Quincy Reports*, 443–444. "Our misfortune is the different apprehension of the nature and degree of our dependence. I wish to see it settled, known, and admitted; for while the rules of law are vague and uncertain, especially in such fundamental points, our condition is deplorable in general." Letter of December 31, 1766, Hosmer's *Hutchinson*, p. 121.

Only one other question—and that intimately associated with the first—vied with it in importance: Were there or were there not rooted in the British constitution fundamental principles of individual liberty superior to legislative authority and must they be recognized in the British legislation for colonial affairs?

[30] XVI, p. 488.

[31] *Memoirs of the Historical Society of Penn.*, XIV, p. 356.

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We might wisely spend much time in considering the dispute in 1770 already referred to—the dispute as to whether instructions could *ipso facto* dispose of all matters of constitutional right of the colonies, or whether even the crown was limited in imperial authority by the fact of the existence of competent and legally recognized colonial legislatures. But passing over those three years or so of legalistic dispute, let us come to "the great controversy" of 1773. In considering this we can echo John Adam's expression of amazement at Hutchinson's audacity in throwing down the gauntlet. The truth probably is that Hutchinson had been grievously tried for years, not alone by what he considered the unmannerly conduct of the rabble, but by the doctrines which he heard in the market place and perhaps in legislative halls. He believed that the theories of the malcontents were unsound and that he in the plenitude of his wisdom could establish their invalidity; and he prepared therefore to bring his heaviest artillery to bear upon the unreasoning followers of Samuel Adams and against the arch agitator himself. What he wished to do, be it noticed, was to demolish a false theory of the empire and bring every one to acknowledge, not the wisdom of obnoxious legislation, but the legal authority of Parliament. By this time doubtless there was much talk about complete freedom from parliamentary control, but there had been little if any formal public announcement by the radicals of anything more than a freedom from taxation.

Hutchinson, it must be said, had considerable reason for having confidence in his massed attack; for his argument was able and compelling, serving by its weight to bring into play all the open and masked batteries of the opposition. He finally reached in his first paper a position from which he believed he could discharge one final and conclusive volley; he was prepared to use an undeniable principle of political science; he believed he could silence his enemies with its mere pronouncement: "It is impossible there should be two independent Legislatures in the one and the same state."[32] Despite all the discussion that had gone on,

[32] *Mass. State Papers*, p. 340.

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despite the fact that Britain had been practicing federalism, Hutchinson could see nothing but the theory of centralized legislative omnipotence and could not conceive of distribution of power between mutually independent legislative bodies. And yet this undeniable axiom of political science was to be proved untrue in the course of fifteen years by the establishment of fourteen independent legislatures in the single federal state, the United States of America.

The two branches of the legislature met Hutchinson's general argument somewhat differently. The house argued valiantly for complete freedom from parliamentary control; in facing the alternative of complete freedom from Parliament and complete subservience, they unhesitatingly chose the former, though they did seem to recognize the possibility of drawing a line between the supreme authority of Parliament and total independence.[33] The council, wiser and more conservative than the house, announced federalism; they contended that the colony had "property in the privileges granted to it," i.e., an indefeasible legal title: "But, as in fact, the two powers are not incompatible, and do subsist together, each restraining its acts to their constitutional objects, can we not from hence, see how the supreme power may supervise, regulate, and make general laws for the kingdom, without interfering with the privileges of the subordinate powers within it?"[34] This is a clear, precise and thorough description

[33] That is to say, they did not deny the possibility of distribution and a line of distinction between governments in the empire. "And, indeed, it is difficult, if possible, to draw a line of distinction between the universal authority of Parliament over the colonies, and no authority at all." "If your Excellency expects to have the line of distinction between the supreme authority of Parliament, and the total independence of the colonies drawn by us, we would say it would be an arduous undertaking, and of very great importance to all the other colonies; and therefore, could we conceive of such a line, we should be unwilling to propose it, without their consent in Congress." Hosmer, *Hutchinson*, pp. 382, 395.

[34] Hosmer, *Hutchinson*, p. 412. It will not do, to argue that they meant, by "subordinate," subject to the whim and control of Parliament; for that is just what they were arguing against. They denied that supremacy meant complete unlimited power, or that subordination meant unlimited submission. Of course "coordinate" is more nearly expressive of federalism than "subordinate;" but the principle these men had in mind is that of distribution, legal distribution, by

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of federalism. It is plain enough, then, that there were some clear-headed men, who, in the years just before the final break with England, were not silenced by the fulminations of British pamphleteers or the dogmatic assertions of Hutchinson into a belief that the empire was simple and unitary; nor were they as yet ready to accept the learned and technical argument of John Adams, though buttressed by pedantic reference to Calvin's case, that the empire was held together by the king, a personal union only.

The American theory of federalism is stated with such amazing accuracy in an answer to Doctor Johnson's *Taxation No Tyranny*,[35] that it deserves quotation at considerable length:

"Now this, in abstract, sounds well. When we speak of the Legislature of a community, we suppose only one Legislature; and where there is but one, it must of necessity have the right you speak of; otherwise, no taxes at all could be raised in that community. . . . Now the present dispute is not with respect to this Island alone, which certainly has but one Legislature, but with respect to the *British* Empire at large, in which there are many Legislatures; or many Assemblies claiming to be so. . . . From the state of the *British* Empire, composed of extensive and dispersed Dominions, and from the nature of its Government, a multiplicity of Legislatures, or of Assemblies claiming to be so, have arisen in one Empire. It is in some degree a new case in legislation, and must be governed therefore more by its own circumstances, and by the genius of our peculiar Con-

which the parts legally control local affairs, a general government regulates and safeguards general affairs.

I omit, to save space, the extended argument, but I must call attention to their assertion of legal possession of constitutional right by the colonies as integral portions of the empire, and also to their declaration, in a delicate manner, that Hutchinson was dealing with theories and disregarding the fact, and that fact was the distribution of powers not centralization: "What has been here said [i.e. by Hutchinson], concerning supreme authority, has no reference to the manner in which it has been, in fact, exercised; but is wholly confined to its general nature." *Ibid.*, p. 413. These arguments are also to be found in *Mass. State Papers*, as well as in the appendix to Hosmer's *Hutchinson*.

[35] *An Answer to a Pamphlet entitled "Taxation No Tyranny,"* found in Force's *American Archives*, Fourth Series, I, 1450, latter part of paragraph on p. 1451.

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stitution, than by abstract notions of Government at large. Every Colony, in fact, has two Legislatures, one interiour and Provincial, viz: the Colony Assembly; the other exteriour and imperial, viz: the *British* Parliament. . . . Neither will the unity of the Empire be in danger from the Provincial Legislature being thus exclusive as to points. It is perfectly sufficient, if the *British* Legislature be supreme as to all those things which are essential to *Great Britain's* being substantially the head of the Empire; a line not very difficult to be drawn, if it were the present subject. Neither is there any absurdity in there being two Assemblies, each of them sufficient, or, if you will, supreme, as to objects perfectly distinct; for this plain reason, that the objects being perfectly distinct, they cannot clash. The Colonist, therefore, allowing that the supreme power or Legislature, where there is but one, must have the right you speak of, will say that with respect to him, there are two, and that the Provincial Legislature is the supreme power as to taxation for his Colony. And so the controversy, notwithstanding your position, will remain just where it began."

The discussions in the Continental Congress of 1774 show us the trouble that the colonists had in reaching a satisfactory theory. By that time, many had come to the conclusion that Parliament possessed no power to pass laws governing the colonies. But the situation and the experience were too plain, and Congress "from the necessities of the case" announced that parliamentary regulation of trade would be accepted, but not taxation external or internal. They proposed as a working basis for the whole system—perhaps no longer to be termed an empire if there was no legislature with any imperial power legally speaking—the distinction between taxation and regulation of commerce, and they really put themselves back, as far as practice was concerned, nearly if not quite in the position of eleven years before. It cannot be supposed, as they accepted the king as their king, that the Congress of 1774 would deny the general right of the mother country, through the executive head, to make war and peace, manage diplomacy, hold the back lands, control Indian affairs and probably the post office—in other words, to exercise

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the significant powers bestowed on the central government of the United States under our Constitution. They were prepared to acknowledge a political order, in which all the great powers bestowed on our central government under the Constitution with the exception of the power to tax should be in the hands of the central authorities at Westminster; and they evidently accepted and promulgated the possibility of distribution of power.[36]

In drawing up the Declaration of Independence the Continental Congress accepted the theory that Parliament had had no legal authority over them; but the Articles of Confederation were drawn on the principle of distribution of powers. Of course it may properly be said that the Articles did not provide for the creation of an imperial state. If, however, we look to see how far they carried on the actual distribution which had existed in practice in the old empire, we see much in common between the empire and the Confederation. We do not find in the new system, of course, any right in the Congress—the new central authority—to exercise some of the functions formerly exercised by the crown in council; there was no right to appoint governors, or to instruct them, or to disapprove of the state laws. But the

[36] I have not attempted in this paper to cite all the instances of an appreciation of the fact that the discussion was over the possibility of distribution of power in the empire. Let me refer to a letter of Gouverneur Morris to Mr. Penn, May 20, 1774. It speaks of the danger of America's falling "under the worst of all possible dominions . . . the domination of a riotous mob," and then proposes "a safe compact" between the colonies and the mother country, "internal taxation i.e. to be left with ourselves," "the right of regulating trade to be vested in *Great Britain.*" Of course the compact was to form the legal and binding authority for the exercise of power. Force, *American Archives*, Fourth Series, I, 342–343.

Notice also that the Pennsylvania Convention of 1774 speaks of the desirability of agreements with Great Britain; she is to renounce certain claims and America is to accept certain statutes; money is to be given to the king. It also dwells on the compact which has to do largely with trade: "With such parts of the world only as she has appointed us to deal, we shall continue to deal; and such commodities only as she has permitted us to bring from them, we shall continue to bring. The executive and controlling powers of the crown will retain their present full force and operation." *Ibid.*, 561. Vide also among other plans, *Proposal for a Plan toward a Reconciliation and Reunion*, etc., by one of the Public (London, 1778).

I omit in this paper mention of various plans of imperial order. They are important as disclosures of effort to distribute powers on a legal basis.

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great powers of war and peace, foreign affairs, the post office and Indian affairs belonged to Congress; and it was understood before adoption that the tremendously important matter of the ownership of the back lands, and the administration of the back settlements—in other words the extension of the empire—was to be in the hands of Congress. Only a detailed examination would show how much of the old practical system of the empire was formulated in the Articles. It is sufficient now to say, and it is quite unnecessary to say it, that very much of the old system was there formulated, and the Articles carried on very distinctly the principle of distribution of powers and on the whole provided for governments with distinct spheres of action.[37] A student of the Articles will of course be carried back to the Albany plan and even to the New England Confederacy of 1643; but he will be hopelessly at sea unless he grasps the fact that the contents of the document are distinctly the products of imperial history, and they constitute, (1) the first quasi-legal formulation of imperial existence, (2) the immediate preparation for ultimate real and full formulation in the Constitution.

The two powers of which there had been much discussion in the ten years before independence were not adequately provided for in the Confederation. Congress, the new general government, was not given the right to raise money by taxation, the Articles accepting the principle of requisitions which the colonists as part of the British empire had insisted on. Everybody knows that requisitions proved a failure in the new system, and this fact in a way gave a tardy justice to the arguments of the parliamentarians in the days before the Revolution. It is more surprising, however, that Congress was not given the right to regulate trade, inasmuch as, almost to the last, the colonies had either openly acknowledged parliamentary authority in the matter or openly professed a willingness to acquiesce in the practical exercise of such authority. The failure to grant the authority to Congress shows how particularism had grown, or it discloses an inability to see that the need of imperial regulation of trade was just as vital in the new system as in the old. Because Congress did not

[37] Even the system of admiralty jurisdiction was carried forward through the Articles into the Constitution of the United States.

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possess these two powers, taxation and regulation of commerce, the Confederation proved a failure.

The Confederation might very well, we may suppose, have proved a failure even if Congress had been given these two essential powers. As to that little or nothing need be said; it is a very old story; the states suffered from the natural effects of a Revolution, and, had Congress had authority on paper, license and particularistic folly might have made it impossible to go on, until the natural reaction in favor of nationalism and order set in. However that may be, these two powers had to be bestowed, conditions proved it; and in the new Constitution Congress was given power to tax for national purposes and to regulate commerce. The principle of federalism was recognized, formulated and legalized in the Constitution; the new government was given its distinct sphere of action and was made the recipient of a body of powers, carefully named and carefully deposited in their proper places; but in the selection and deposition little needed to be done but to follow the practices of the old British colonial system.

The Convention of 1787 had difficulty in seeing the whole complicated scheme as a working mechanism; but how could the members possibly have imagined it at all, or provided for the scheme which in its essentials was the basis of federalism the world over, without the aid of the historical forces and the old practices? Save perhaps with the old troublesome problem of the militia, the military question in the federal state, they had little trouble in determining what should be the distribution and classification of powers. Their chief difficulty was again the old one—colonial disobedience, which was now state willfulness; and this difficulty was surmounted, as we know, by firm adherence to the principle of distinction between local and general authority, and by recognizing that each governmental authority was competent and supreme within its own sphere and had the legal power to enforce its lawful acts on its own citizens. Perhaps both parts of this principle of cohesion and of authority—of cohesion because of division, and of authority because of immediate operation—were inherited from the old empire; certainly the former one was.

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NEW METHODS IN DUE-PROCESS CASES[1]

ALBERT M. KALES

Chicago, Illinois

In addressing the court in due-process cases one should not commence with the usual salutation "May it please the Court." Instead, one should say "My Lords." Backed by and charged with the enforcement of the due-process clause of the fifth and fourteenth amendments, the Supreme Court of the United States is the American substitute for the British house of lords. It constitutes the real and only conservative second chamber of the federal government. It is a second conservative chamber for each of the state governments.[2]

The time has come when the political scientists of the country should recognize, in the decisions of the United States Supreme Court under the due-process clause, the functioning of a second chamber, organized to defeat the popular will as expressed in legislation when that will appears to endanger what the court may regard as a fundamental requirement of the social structure itself.

Like all conservative second chambers, the Supreme Court and the due-process clause are in a hopeless dilemma. If the popular will were frustrated as often as the dissenting opinions of Mr. Justice McReynolds indicate that it should be, the second chamber function of the court would be assailed by the recall of judicial decisions. If the court bowed to the popular will as often as the dissenting opinions of Mr. Justice Holmes indicate that it should, the second chamber function of the court would cease to be exercised. The success of the United States Supreme

[1] A paper read before the American Political Science Association, Philadelphia, December 27, 1917.

[2] *Unpopular Government in the United States*, University of Chicago Press, 1914. Chap. XVI.

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Court as a second chamber consists in its being able to live while still subject more or less continuously to varying degrees of unpopularity.

These preliminary observations are not made by way of criticism of the court's second chamber function (for such a function is desirable and necessary), but because it is important that counsel in a due-process case should keep always before him the true character of the tribunal he addresses.

Having saluted the court as "My Lords," counsel appearing against the act in the usual case involving so-called "social legislation"—as hours of labor laws, minimum wage acts and prohibitions upon such a business as employment agencies—has a comparatively easy task. On the face of the record it will appear that by the act the managers of business are deprived of liberty or property or both. A *prima facie* case is thus made against the validity of the act, and counsel opposing it may safely rest until the other side has been heard in justification of it. After that, counsel opposing the act should join issue on the broad question of whether a justification has been established.

The principal burden of the argument falls upon counsel supporting the act. He must justify the taking of liberty or property which plainly appears. "Due process" in this class of cases is merely justification.

1. It is all out of fashion to attempt to justify by incantations to the "police power." The judges are quite alive to the fact that you get nowhere along that line till you classify and define police power, and by that time you might as well have classified and defined the possible means of justification.

2. The law teachers, following what is generally supposed to have been the teaching of the late Professor J. B. Thayer, have attempted to translate "justification" or "due process" into this general formula: The act which deprives one of property or liberty is justified if that deprivation has a substantial and rational or reasonable relation to the promotion of the health, safety, morals or general welfare of the public or any part of the public.

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An essential part of this formula in the hands of the professors of law has been the administrative rule[3] that no act is to be declared unconstitutional unless it is clearly so "beyond a reasonable doubt" or, as some courts have said, beyond a "rational doubt."[4] This has been declared to mean that the "violation of a constitutional right ought to be as obvious to the comprehension of every one as an axiomatic truth, as that the parts are equal to the whole;"[5] and that "the validity of a law ought not to be questioned unless it is so obviously repugnant to the Constitution that, when pointed out by the judges, all men of sense and reflection in the community may perceive the repugnancy."[6]

One has only, however, to look at the Lochner case,[7] the Adair and Coppage cases,[8] Smith v. Texas,[9] the Upper Berth case,[10] and the recent Washington Employment Agency case,[11] to find that acts, which intelligent dissenting judges could regard as falling within the formula of the law teachers, were held invalid. This demonstrates the futility of the formula, and a legal formula which does not work in a close case is not of much use to counsel.

3. The attempted legalistic formulae which the court itself uses are the most obvious frauds.

In C. B. & Q. R. R. Co. v. McGuire,[12] Mr. Justice Hughes,

[3] J. B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 *Harvard Law Review*, 129, 138–142.

[4] Ex Parte M'Collum, 1 Cow. (U. S.) 550, 564; Sinking Fund Cases, 99 U. S. 700.

[5] Grunball v. Ross, Charlton (Ga.) 175.

[6] Administrators of Byrne v. Admrs. of Stewart, 3 Des. (S. C.) 466.

[7] Lochner v. N. Y., 198 U. S. 45 (1905) where the New York ten-hour law for bakers was held void.

[8] Adair v. U. S., 208 U. S. 161 (1908); Coppage v. State of Kansas, 236 U. S. 1 (1915), which held void acts which forbade employers to discharge employees because they belonged to a union.

[9] 233 U. S. 630 (1914), where an act was held void which prohibited any person from acting as a conductor on a railroad train without having for two years prior thereto either worked as a brakeman or conductor on a freight train.

[10] Chi. Mil. & St. Paul R. R. v. Wisconsin, 238 U. S. 491 (1915), where an act was held void which required the Railroad Company to leave the upper berth up when it had not been disposed of and the lower berth was occupied.

[11] Adams v. Tanner, 244 U. S. 590, holding void an act which in effect prohibited certain employment agencies from doing business.

[12] 219 U. S. 549 (1911).

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speaking for the court, and after reviewing cases involving the question of "due process," where the act had been sustained, says:

"The principle involved in these decisions is that where the legislative action is arbitrary and has no reasonable relation to a purpose which it is competent for government to effect, the legislature transcends the limits of its power in interfering with liberty of contract; but where there is reasonable relation to an object within the governmental authority, the exercise of the legislative discretion is not subject to judicial review."

This statement says nothing until it has been determined what is meant by "a purpose which it is competent for government to effect," and by "within the governmental authority."

In McLean v. Arkansas,[13] Mr. Justice Day, speaking for the court said:

"If there existed a condition of affairs concerning which the legislature of the State, exercising its conceded right to enact laws for the protection of the health, safety or welfare of the people, might pass the law, it must be sustained; if such action was arbitrary interference with the right to contract or carry on business, and having no just relation to the protection of the public within the scope of legislative power, the act must fail."

A critical examination of the first part of this statement shows it to be quite as meaningless and useless as a reference to the "police power." The court says the act must be sustained, if a condition of affairs existed (1) concerning which the legislature of the state might pass the law, (2) in the exercise of its conceded right to enact laws for the protection of the health, safety, or welfare of the people. Now who would doubt that, with these conditions and premises assumed under which the law must be valid, it would be sustained? Take the second half of the above statement. The act must fail (1) if such action was an arbitrary interference with the right to contract or carry on business, (2) and having no just relation to the protection of the public within the scope of legislative power. Who can doubt that an act

[13] 211 U. S. 539, 548 (1909).

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about which all these self-proving assertions are true would be invalid? Such statements reveal nothing.

The opinions of the court are replete with statements as circular and meaningless as these.

4. Mr. Justice Holmes gave us a revealing flash when, in his dissenting opinion in the Lochner case, he said:

"The decisions will depend on a judgment or intuition more subtle than any articulate major premise."

This is no announcement of a legal theory by a dissenting judge. It is a bit of psycho-analysis of the mental operations and visceral sensations of judges who decide due-process cases. It is testimony by a direct observer that the judges achieve a certain freedom of action in curbing the legislature by abandoning the rigid formulae of law and acting, like juries and legislatures themselves, upon judgment or intuition—something more subtle than any articulate premise—an admirable basis, certainly, for the exercise by the court of its constitutional function as a conservative second chamber.

The police power, the law professor's formula (divorced from the administrative rule noted), the circular formulae of the judges, and the inarticulate major premise, all come to this: The court stands between the popular will and certain fundamentals of the social order. It condemns acts of the legislature as the house of lords might refuse its approval of an act adopted by the commons.

5. Counsel arguing in support of the act had, therefore, better proceed at once to demonstrate that the legislation in question is not inimical to those fundamentals of the social order which the court protects; or, better yet, that the act is necessary in order to improve and preserve the social order.

To make such an argument, counsel needs to know what are the fundamentals of the social order which the court protects. No attempt is here made to formulate those fundamentals,[14] because to do so one must be more than a lawyer. In passing, however, one may deplore that so much speculation is to be

[14] See however, "Due Process, the Inarticulate Major Premise, and the Adamson Act," 26 *Yale Law Journal*, 527–529.

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easily found concerning social orders and the fundamentals of social orders that do not exist, and so little information about those that do.

Then counsel appearing in support of the act need evidence in order to demonstrate by proofs that the act in question is not inimical to the fundamentals of the social order. This is where counsel supporting the act most often fail.

(a) In many cases they do not produce any evidence of actual conditions to which the statute applies. They do not even collect any general information for the court to take judicial notice of. Instead, they rely upon presumptions in favor of the act based upon the further presumption (often notoriously contrary to fact) that the legislature made a full and complete investigation and found a suitable justification for the act in question.

Such presumptions make the weakest kind of a case. If the court really founded its judgments upon such presumptions it would largely abrogate its function as a conservative second chamber. As a matter of fact, such presumptions are apparently effective only when the court takes judicial notice of the state of opinion or of facts and circumstances which furnish a justification. Thus, it has never been necessary to put in evidence in order to justify the prohibition of the liquor business, or the sale of cigarettes, or gambling in futures in grain, or stocks. But when it comes to prohibiting or regulating in a burdensome manner what appear to be legitimate and useful, if not necessary, businesses, the presumption of justification fails. This indicates that it never was really effective.

(b) Mr. Brandeis in the eight-hour law for women case,[15] Mr. Frankfurter in the ten-hour law for men[16] and minimum wage act for women[17] cases, and, very recently, Mr. Justice Brandeis in his dissenting opinion in the Washington Employment Agency case,[18] presented to the court an elaborate collec-

[15] Muller v. Oregon, 208 U. S. 412 (1908).
[16] Bunting v. Oregon, 243 U. S. 426 (1917).
[17] Stettler v. O'Hara, 243 U. S. 629 (1917).
[18] Adams v. Tanner, 244 U. S. 590 (1917).

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tion of information, of which the court was asked to take judicial notice for the purpose of furnishing evidence to justify the acts in question.

This course appears to be effective when the court is convinced that the data presented has been generally accepted as true and may be relied upon as showing the general verdict of those entitled to speak with authority concerning the facts. This has obviously been the case in the more recent hours of labor cases.

On the other hand, when the court is not convinced that the data collected has been generally accepted as containing a general verdict on the issues of fact and opinions presented, but consists merely of *ex parte* statements advocating a particular view, it is quite ineffective as the basis of evidence upon which to found a justification.

This came out in the argument in the Oregon minimum wage case when the Chief Justice picked up Mr. Frankfurter's fat collection of data on minimum wage laws and declared that he could produce twice as much material to show that the institution of private property was all wrong and should be abolished.

When the recent Washington Employment Agency act was before the court Mr. Justice Brandeis' data concerning the evils of employment agencies, which the act in question sought to cure by prohibiting the business entirely, proved utterly ineffective because the majority of the court evidently regarded it as a collection of *ex parte* statements and opinions which, for all the court could tell, might be offset by equally potent facts and opinions on the other side.

That the majority of the court in the Washington Employment Agency case was unwilling to take the data put forward by Mr. Justice Brandeis as the final word upon the facts appears from the following language of the opinion of the court:

"Because abuses may, and probably do, grow up in connection with this business, is adequate reason for hedging it about by proper regulations. But this is not enough to justify destruction of one's right to follow a distinctly useful calling in an upright way. Certainly there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible

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practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its suppression would be in the public interest."

The court evidently had in mind that if an act abolishing the legal profession came before it and one side collected in many volumes all the harsh things that have been said *ex parte* about lawyers, and all the opinions which have advocated their complete suppression, the act would not be justified because, in spite of the volume of such data, it had not been authenticated by general acceptance.

In the same way, an act abolishing the steel industry could hardly be justified because an enormous amount of data might be collected showing the vast loss of life in the business, and the way in which it used up the vitality and energy of human beings, even when their lives were not taken by accidents.

How can any one say that the court, in the Washington Employment Agency case, was wrong? Certainly it has not yet been generally accepted in the United States that the employment agency business is necessarily and inherently bad for the community, like the liquor business or like gambling. It may be that we shall come to such a state of opinion, but we are not there yet. Hence the *ex parte* statements and investigations of specialists have not been authenticated by general acceptance. Since they were not, in the particular case, authenticated by special proofs by witnesses subject to cross-examination, they cannot properly be used as the basis for the justification of an act prohibiting such agencies.

In a few years perhaps such data may become authenticated by general public acceptance. Then the court will act upon that evidence and will sustain the legislation.

If the Washington Employment Agency case was rightly decided on the ground stated, we have the key to the decision in the Lochner case—which, in spite of all that has been said, stands and is not overruled. In that case the dissenting judges relied only on data of which the court was asked to take judicial notice. The majority, however, did not regard such data as having been authenticated by any general public acceptance. It remained,

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so far as it was applicable to the baking industry, merely the *ex parte* views of the advocates of a particular thesis.

The difference between the Lochner case and the Oregon ten-hour law for men case is that the record of evidence in the two cases is different. In the Oregon case the court took notice of the fact that the data produced had been authenticated by general public acceptance, so that the court could safely proceed on the supposition that the investigations and data produced were true.

(c) The only way to meet the skepticism of the court towards such data as Mr. Justice Brandeis relied upon in his dissenting opinion in the Washington Employment Agency case, is to build up a record of evidence in the trial court, by witnesses produced for cross-examination—witnesses who will testify to the facts and opinions upon which a justification may be based, and will establish their conclusions as those which, if not already generally accepted, are nevertheless certain to be accepted. Such a method of putting in a case for the act challenges the opponents to produce evidence on their side. If they fail to do so the basis is laid for the contention in the Supreme Court that they must take the consequences of their default, and that the court cannot, in the face of full and uncontroverted proofs, ignore in the particular case before it facts and data which, if true, show a justification for the legislation in question.

Counsel seeking to justify an act taking liberty and property has these three points to consider:

First: Can he rely, for the facts which make the justification, upon what the court takes judicial notice of without any particular data being brought to its attention—as that liquor sales, gambling, insanitary practices, the failure to use prophylactic health measures and safety appliances, are inimical to the welfare of society?

Second: If not, can he still rely upon data which, when brought to the attention of the court, will be effective because the court will recognize it as embodying generally accepted facts and conclusions—as in the recent hours of labor cases?

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Third: If not, then counsel must build up his case in the trial court by the testimony of witnesses subject to cross-examination. He must put in evidence his data as to facts and opinions, and then authenticate it completely by testimony which will show that the conclusions reached must become generally accepted, and by challenging those who appear against the act to produce any evidence to the contrary on their side.

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LEGISLATIVE NOTES AND REVIEWS

EDITED BY W. F. DODD

Legislative Reference Bureau, Springfield, Illinois

Absent-voting Laws, 1917. Beginning with the Vermont law of 1896, twenty-four states, comprising not far from one-half the population of continental United States, now have legislation in force which permits duly qualified electors to vote at general or primary elections, or both, outside of the election precinct in which they reside.

There are two main classes of absent-voting laws; those which expressly apply to persons engaged in the military service of the state or nation; and those which are designed primarily for the benefit of civilians, although most of them are not in terms expressly restricted to that class of voters. Only the Oklahoma law of 1916 and the laws enacted in 1917 which come in the last division will be considered here.

Although differing in details, these laws in their general features follow more or less closely two general types, namely, the Kansas and the North Dakota types.[1] There are now ten states with laws similar to the Kansas act of 1911[2] and fourteen states with laws resembling the North Dakota act of 1913.[3]

All of the thirteen laws now under consideration,[4] with three excep-

[1] For summaries of absent-voting legislation enacted before 1917, see *American Political Science Review*, VIII, 442, (1914), X, 114, (1916), XI, 116, 320, (1917); *National Municipal Review*, III, 733, (1914); *Case and Comment*, XXIII, 358, (1916).

[2] Colorado, Kansas, Missouri, New Mexico, Nebraska, Oklahoma, Oregon, Vermont, Washington, Wyoming.

[3] Illinois, Indiana, Iowa, Michigan, Minnesota, Montana, North Carolina, North Dakota, Ohio, South Dakota, Tennessee, Texas, Virginia, Wisconsin.

[4] *Laws of Illinois, 50th General Assembly*, (1917), pp. 434 ff. *Laws of the State of Indiana, 70th Regular Session*, (1917), pp. 317 ff. *General Election Laws of Minnesota*, (1917), pp. 137 ff. *Laws of Montana, 15th Regular Session*, (1917), pp. 352 ff. *Public Laws of North Carolina*, (1917), pp. 78 ff. *New Mexico Session Laws, of 1917*, pp. 956 ff. *Primary and General Election Laws of the State of Oklahoma*, (1917), pp. 16 ff. *Election Laws of the State of Ohio*, (1917), pp. 132 ff. *Laws of South Dakota*, (1917), pp. 317 ff. *General Laws of Texas, 35th Legislature*, (1917), pp. 62 ff. *Session of Laws of the State of Washington, 15th Session*, (1917), pp. 712 ff. *Wisconsin Session Laws*, (1917), pp. 956 ff. *Digest of the Election Laws of Tennessee*, (1918), ch. 8.

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tions—New Mexico, Oklahoma and Washington, which follow the Kansas model—conform more or less closely to the North Dakota type. The laws of Illinois, Indiana, New Mexico, North Carolina, Oklahoma, Ohio, Tennessee and Texas, are entirely new enactments; while those of Minnesota, Montana, South Dakota, Washington and Wisconsin amend legislation originally passed in 1913 or 1915. Two of the first group, the Texas and Indiana laws, were passed as "emergency measures."

The laws of Illinois, Indiana, and Minnesota are skillfully drawn and show some advance over previous legislation, especially in safeguarding the privilege of absent-voting. In most respects these three laws are entitled to rank as the best examples of absent-voting legislation thus far enacted. At the other extreme stands the Texas statute, deserving a place among the foremost examples of crudely drawn legislation, both in form and content. The North Carolina statute is the briefest of all, with the exception of the Vermont law of 1896. It is so very brief as apparently to leave much to be desired in respect to preventing abuses and fraudulent practices in connection with absent-voting.

All of the statutes of course confine the privilege of absent-voting to duly qualified electors who have previously conformed to preliminary registration requirements where they exist. Seven states—Illinois, Indiana, Montana, North Carolina, Oklahoma, Texas and Washington—require the voter to be absent from his home county; while in five states—Minnesota, New Mexico, Ohio, South Dakota and Wisconsin—it is sufficient for the voter to be absent from his home precinct; and in Tennessee he may be absent either from the city or county where he is registered. New Mexico and Washington add the requirement that the absent voter must be more than 15 and 25 miles, respectively, distant from his precinct.

Indiana and Wisconsin have the distinction of being the first states to undertake to do justice to the voter who is detained at home by sickness or physical disability. These states now permit such persons to vote *in absentia* if they are unable to appear at the polling place in their precinct. The Indiana law also extends the privilege of absent-voting to persons in quarantine. Usually the absence must be due to the nature of the voter's business or duties or some unavoidable cause, although some states make no discrimination respecting the causes of absenteeism.

With respect to the elections in which absent-voting is permissible, eight states—Illinois, Indiana, Montana, North Carolina, Ohio, South

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Dakota, Tennessee and Wisconsin—extend it to primaries as well as to all general and local elections; but Minnesota expressly excludes primary elections. The Washington law applies to the election of national and state officers and to the primaries for the nomination of candidates for such offices. The opening sections of the loosely drawn Texas law make it apply to "elections" without qualification; but in the penal clause at the end of the act there is a proviso that "this act shall apply to any and all primary elections only."

In the Illinois and New Mexico laws the absent voter is expressly permitted also to vote upon constitutional amendments or questions of public policy submitted to the voters at any election. In Minnesota he may vote on questions submitted at "any county option election;" and in Tennessee he may vote "at any election—for any purpose." None of the other laws contains any express statement on this point, although the right to vote on referenda seems in most laws to be taken for granted in the provisions relating to the counting of the ballots cast *in absentia*.

The preliminary steps which the absent voter must take in order to secure a ballot vary somewhat from state to state. The Washington law permits the absent voter to present himself at any polling place within the state while the polls are open on election day. Upon the production of a certificate of his qualifications from the registration officer of his home precinct and signed by the voter, he makes oath to an affidavit stating his right to vote and that this "election is common in its main features" to both his home precinct and this precinct; that he has had no opportunity to vote at home, that he will be unable to reach home that day; that he will lose his vote by reason of his absence unless permitted to vote in this precinct; and that he has not voted and will not vote elsewhere at this election. The voter is then given "an official ballot taken from the highest numbers," which he takes into a voting booth and marks the same as any resident voter may, "except that he shall vote only for federal, United States senatorial and congressional, state and legislative officers, and for which he might vote in his home precinct, or for the nomination thereof, and for this purpose he may write in the names of any candidate or candidates under the proper headings. . . ." The ballot is then sealed and returned to the voter's home county, where it is not opened and counted until the canvassing board meets for the official canvass of ballots cast in the regular way. In order to be counted the ballot must have been received by the county auditor within six days from the date of the

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election or primary. The provisions of the New Mexico and Oklahoma laws are not essentially different from the foregoing.

All the other laws of 1917 are of the North Dakota type and provide some means whereby the voter who expects to be absent from his home precinct or county may obtain a ballot in advance of the day of election and have it counted by the polling officers in his home precinct on election day along with ballots cast in the usual way.

In only three states, Illinois, Minnesota and Tennessee, are election officials required to furnish the voters with a circular of instructions how to obtain and cast a valid absent voter's ballot, a provision which deserves universal adoption.

Application for a ballot may be made either by mail or in person, except in Texas where the voter must apply in person not more than ten nor less than three days before the election. If made by mail, the application must be made not more than thirty days nor less than seven days before the election in Minnesota; not more than thirty nor less than three days before in Ohio; not more than fifteen nor less than three days before in Illinois; not more than twenty nor less than three days in Wisconsin; within thirty days preceding the election in Montana; not more than thirty nor less than two days before in Indiana; in South Dakota at any time after the delivery of the ballots to the officers charged with their distribution to the precincts; while in North Carolina no time is specified. In Tennessee the application must be in writing, and made not less than ten nor more than thirty days before the election, when the applicant is within the confines of the United States; if outside, then not less than thirty nor more than ninety days.

If the application is made in person, it must be made not less than one day before election in Wisconsin; and not more than ten days nor less than one "secular day" before election in Indiana; and not more than ten nor less than three secular days before in Illinois. In other states apparently the same time limit applies to personal applications as to those by mail. The Montana and Indiana laws expressly declare that no elector shall be entitled to receive an absent voter's ballot on election day.

The application is always made to the official or board charged with the preparation or distribution of the ballots to precinct polling places, the county clerk, county auditor, clerk of the circuit court of the county (Indiana); or, in the case of local elections usually to the city or town clerk or board of election commissioners.

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A formal application blank is provided, and a small fee sufficient to cover the postage charges and a part of any extra expense connected with the absent-voting system is exacted of the applicant in Minnesota, Montana and North Carolina. The Ohio law, on the other hand, expressly states that no fee other than postage charges shall be required. If the application is for a primary ballot, the voter is required in Illinois and Indiana to state the name of the party to which he belongs; and in the latter state he is required to swear that "at the last general election he voted for a majority of the candidates of such party." In Texas, at the time of his personal application, the voter must present his tax receipt or evidence of tax exemption. In South Dakota the applicant is required to sign duplicate identification slips, one of which is given to the applicant to be returned with his ballot, the other being sent to the superintendent of the election board in his home precinct for purposes of comparison when the ballot and the first slip are returned for checking and counting. In Illinois, Indiana and Wisconsin the voter has to swear that he will return the ballot on or before the day of election.

When the voter applies for a ballot, every state, except North Carolina and Tennessee, requires a sworn statement setting forth the voter's residence and right to vote. In Illinois, Indiana and Wisconsin the nature of the voter's business and the reason for his absence must also be stated. This affidavit is signed by the applicant himself, except in Montana where the affidavit is made by two voters who know the applicant to be a resident of the precinct. In North Carolina the applicant merely signs a certificate as to his own qualifications; and in Tennessee the official to whom the application is made must satisfy himself that the applicant is entitled to vote. In the case of sick or disabled voters in Wisconsin, "a certificate of a duly licensed physician as to such sickness or disability" must be attached to the application, a wise precaution which is omitted from the otherwise carefully drawn Indiana law.

The application blank with the accompanying affidavit or certificate (in Texas, the tax receipt or evidence of exemption) is preserved by the issuing official until the ballot has been marked by the voter and returned to him in a sealed envelope. The application and unopened ballot envelope are then sent by mail, or delivered by the official, in person or by his duly deputized agent, to the election officials in the voter's home precinct.

Having complied with all the formalities connected with the application, the voter becomes entitled to receive an official absent voter's

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ballot. The North Dakota requirement that this ballot shall be on tinted paper, which makes identification possible wherever there is only one such ballot in a precinct, has not seemed to commend itself to the legislators of any other state. The Indiana law expressly states that these ballots shall be "of the regular official ballots to be used at such election," and again, that "absent voter's ballots shall be in all respects like other ballots." Montana has a similar provision, and this seems to be the implication of the laws in the other states under consideration. In Minnesota and South Dakota the ballot may be sent to any address which the voter designates in his application. In Indiana, before mailing or delivering the ballot to the voter, the clerk issuing it is required to affix his official seal and place his signature on the back and near the lower left hand corner, leaving sufficient space on the margin for the initials of the poll clerks. In Montana the numbered stub must not be detached from the ballot until it is about to be placed in the ballot box.

Along with the ballots the official charged with their distribution is required in all these laws to provide two envelopes, one usually called the ballot envelope and the other the carrier envelope. The ballot envelope has printed on its face the name, title and address of the official to whom the ballot is to be returned after it has been marked by the voter. On the back of this ballot envelope there is generally printed an affidavit corresponding very closely to the affidavit or certificate filed in connection with the voter's application for a ballot. Underneath this affidavit is printed the jurat or certificate of the magistrate before whom the affidavit is executed and the ballot is marked.

Having received his ballot and envelopes from the county clerk of his home county, the Texas voter is required to mark his ballot "then and there" in the presence of that official. In Illinois, Indiana and Montana the ballot may apparently be marked at any time before election day; but in South Dakota it may not be marked more than five days before the election. In Minnesota the marking may be done any time after receipt of the ballot, but so as to arrive at the home voting place on or before election day; otherwise it will not be counted.

As regards the place where the absent voter may cast his ballot, the laws of Illinois, Indiana, North Carolina and South Dakota specify no place outside the home county or precinct, and apparently the ballot might legally be counted if marked in some other state. The Texas provision mentioned above apparently restricts the place of marking to the office of the county clerk of the voter's home county. Thus far,

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only Tennessee has followed the example of Virginia (1916) and authorized absent-voting in practically any part of the world, although Montana and Minnesota are nearly as generous. Minnesota now permits absent-voting "at any place within the territorial jurisdiction of the United States, exclusive of Alaska and the so-called island possessions of the United States;" while Montana authorizes it "at any place in the State of Montana or in any State or Territory of the United States." Montana and Indiana also permit expectant absentees to mark their ballots before they leave their home county.

The official before whom the voter may mark his ballot and subscribe to the affidavit on the ballot envelope is usually any officer authorized by law to administer oaths and having an official seal. Most laws are silent upon the point whether this official must be one residing within the voter's state; but nothing in the context of most of these laws appears to prevent marking the ballot outside the voter's own state, and the Ohio and Montana laws, expressly authorize such extra-state voting. In the Montana law, if the ballot is marked outside of the state, it must be done before any officer authorized by the law of Montana to take the acknowledgment of instruments outside of that state. In Texas the marking must be done in the presence of the county clerk of the voter's county; and, under the Minnesota law, before any county, village or city officer having an official seal; or, if outside the state, before any United States postmaster or assistant postmaster, in which case the postmaster's signature must be authenticated by the cancellation stamp of his office. It is expressly stated in the Minnesota law that postmasters are not bound to act in the foregoing capacity, but that if they do so act, they do so only as a favor. Under the Tennessee law, if a civilian voter is outside the limits of the United States, the marking must be done before an American consul, or his assistant; if the voter is in the army or navy, the marking must be done before his commanding officer, or some other officer duly delegated by him.

To this officer, whoever he happens to be, the voter is in each instance required to exhibit his absent voter's ballot unmarked, and then in the presence of the officer and of no other person, and in Texas "without assistance or suggestions from any other person," he marks the ballot, but so that the officer may not see or know for whom he votes. The Tennessee law makes this secrecy optional with the voter. He then folds the ballot so as to conceal the marks, places it folded in the ballot envelope which he seals, and signs the affidavit or certificate printed on the back of the ballot envelope. The officer, or

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"attesting witness" as he is called in the Minnesota law, is then required in each instance to sign the certificate or jurat printed just below the voter's certificate or affidavit. The officer must certify that all the formalities set forth in the law, so far as they relate to marking the ballot, have been properly complied with. In addition to the more or less complete enumeration of these requirements, the Illinois, Indiana and Montana laws require the further statement by the officer that the voter was not solicited or advised by him to vote for or against any candidate or measure. The certificate of the attesting witness in Minnesota is more elaborate than in most states, and concludes with the statement that the return envelope "was sealed in my presence and after being sealed was deposited in my presence in the United States post office at . . . without being opened." Under the Tennessee law the certificate must include a statement of the color of the voter, his height, age, color of hair and eyes, and estimated weight.

The next step in the process of absent-voting has to do with the transmission of the ballot, after it has been duly marked, to the voter's home precinct for counting on election day along with the ballots cast in the customary manner. Where the ballot has been marked in the presence of some officer other than the one issuing the ballot to the voter, the laws, with one exception (Minnesota), require that the ballot, properly sealed and attested, shall be returned to the issuing officer by mail; or if more convenient, in person, in Indiana and Wisconsin. It is then placed, unopened, with the application and affidavit, or tax certificate (Texas), in an outer or carrier envelope addressed to the election officers in the voter's home precinct, and plainly labeled as containing an absent voter's ballot which is not to be opened except at the time prescribed by law. If the issuing officer receives the absent voter's ballot before the regular ballots have been sent out to the polling places, he merely encloses the ballot and application papers along with them; if received after such delivery, the ballot and application papers may be sent by mail to the precinct officials, or they may be delivered in person by the officer or by his duly deputized agent (Illinois, Indiana, Wisconsin). The Minnesota law provides that the marked and sealed ballot shall be sent by the voter himself directly to the precinct officials, and seems to imply that when received at the voter's home post office before the day of election, these ballots are to be retained there in the custody of the postal officials until their delivery to the precinct officials on the day of election, although the law is not entirely clear upon this point. Under those circumstances, the application papers have to be

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transmitted to the precinct officials apart from the ballots. In order to facilitate the delivery of the ballots arriving through the mails, the Minnesota law makes it the duty of the city clerk of every city having more than two voting precincts to furnish the postmaster at least two days before the day of elections a certified tabulated list of the polling places in each district in the city, giving location by street and number.

In Texas the county clerk is required to forward the absent voter's ballots to the precincts on the second day prior to election. In Illinois they must reach the issuing officer "in sufficient time to be delivered . . . to the proper polling place before the closing of the polls on the day of election," and a similar provision is found in Indiana. In Minnesota apparently only the ballots which are delivered to the precinct officials by the post office employees on the day of election are to be counted. The Illinois law is the only one to make any provision for ballots received too late to be counted: the hour of receipt is to be endorsed on the envelope which, with its contents unopened, is to be kept as long as the law requires the keeping of ballots used at the election, and then is to be destroyed along with them.

The rules governing the acceptance, rejection and counting of ballots are in the main substantially those appearing in the North Dakota law of 1913, previously described in these pages, with a few noteworthy variations. In Ohio, for example, the ballot envelopes are to be opened "as soon as the polls open on the morning of election day." In Illinois and Tennessee the opening is not to take place until after the closing of the polls, and a similar rule is found in Minnesota. In Texas the ballot envelopes are to be opened between 2 and 3 p.m. of the day of election, after a public announcement by the presiding election judge that the ballot of an absent voter, naming him in each case, is proposed to be cast, at which time the vote may be challenged. In Indiana and Minnesota the poll clerks are required to initial the absent voter's ballot in the same manner as other ballots before depositing them in the ballot box. In Montana before the ballot may be deposited in the box, the number of the stub attached to the ballot must be noted and the stub detached. If the stub is found already detached when the envelope is opened, the ballot must be rejected. In North Carolina the ballots sent by mail are to be opened at 3 p.m. on the day of election. In Indiana, Montana and Wisconsin, the ballot envelopes may be opened at any time between the opening and the closing of the polls, and this is the provision most commonly found in such laws.

All but three of the states (South Dakota, Tennessee and Montana)

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make provision for challenging an absent voter's right to have his ballot counted. In Indiana the challengers at the polls must be notified before any such ballot is deposited in the box in order to give opportunity for a challenge. In Illinois, if the challenge is sustained, a notice must be sent by mail by the election judges to the absent voter's place of residence. Challenges are to be heard and decided by the regular polling officers exactly as if the voter had attempted to vote in person, except in New Mexico and Washington, where the challenge is made before, and heard and determined by, the county board of canvassers.

In case an absent voter dies after having marked and mailed his ballot and the fact of his death—"before the opening of the polls," in Illinois—is proved to the satisfaction of the polling officers before the ballot has been deposited in the ballot box, the ballot must be rejected in Illinois, Indiana and Wisconsin; but if the fact of death has not become known or has not been established, the counting of such a ballot will not be sufficient to invalidate the election. The other laws contain no provision on this point.

The Minnesota law expressly states that no person who has voted by mail shall be permitted thereafter to vote in person at the same election. Indiana and Montana, on the other hand, make provision for the possible return of the voter to his precinct in time to cast his vote in person. Indiana permits the absent voter who returns to his precinct to vote in person although a ballot may have been sent or delivered to him, provided he returns the ballot or has not availed himself of the privileges of an absent voter. If he has marked and sent in an absent voter's ballot which has been marked by the polling officials "rejected as defective," he may appear in person and have "the same right to vote as any other voter voting in person." Furthermore, if an absentee has marked his ballot under this law and afterwards returns to his precinct before his ballot has been deposited in the box, he may, if he so desires, have his ballot envelope opened in his presence and the ballot deposited in the box. Or he may ask for a new ballot, in which case the ballot envelope shall not be opened, but is to be preserved with the defective ballots with the endorsement, "unopened because voter appeared and voted in person." A provision similar to this last is also found in the Montana law, but this law goes further and makes it the duty of a returning voter to go to his polling place and present himself to the judges of election there; and if he willfully neglects so to do, he is to be deemed guilty of a misdemeanor and punished by fine or imprisonment or both.

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Appropriate penalties for infractions of the absent-voting law, for false swearing and other fraudulent practices appear in most of these laws. Both Indiana and Illinois make punishable by fine or imprisonment willful neglect or refusal to cast or return an absent voter's ballot; and Montana makes punishable any offense committed outside of the state which would have been punishable as a violation of the act if committed within the state.

In conclusion, one feature of the Ohio law, believed to be unique, deserves mention. Special provision is made for taking the votes of students attending colleges, universities or other institutions of learning which are located in some county other than that which constitutes the student's legal residence. In the county where the institution is located the student is not permitted to vote in person, "unless he shall have the intention of continuing to reside in such county . . . when he shall have ceased to attend such institution." Whenever there are voters at such institutions who desire to vote at any election at which they are eligible to vote in their home precinct, the president of the institution, or "any three such persons who are desirous to so vote," may in writing request the board of deputy state supervisors of elections of the county in which the institution is located to cause some officer or member of that board to visit the institution on a day fixed by the board, not more than twenty nor less than five days before the election. On that day the official designated shall "attend at the institution in a room to be furnished by the president," and during stated hours he is to administer oaths, certify to affidavits and "receive and receipt for any absent voter's ballots . . . from any persons in attendance at such institution who may be desirous of availing themselves of the provisions of this act."

P. Orman Ray.

Northwestern University.

Reform of Legislative Procedure in Nebraska. The initiative of the reform came from the Nebraska legislative reference bureau. The leader and champion of the reform was Representative J. N. Norton of Polk County.

Nebraska was afflicted with a costly, antiquated and stupid legislative procedure, inherited through fifty years of spoils politics and fetiched tradition. Bills were enrolled and engrossed with pen and ink, committee meetings transacted important business at midnight hours, bills were introduced in a multitude of illegal and ungrammatical

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forms. Four to five times the number of necessary employees were placed upon the pay roll. Important bills had been stolen from the files at some sessions. Errors of great magnitude had been made in the enactment of laws. Trading and logrolling had become a regular feature of legislative sessions.

On April 16, 1913, a preamble and resolutions reciting these facts were introduced by Representative Norton of Polk and unanimously adopted the same day in house and senate. The resolutions provided for a committee of three each from the house and senate which should meet after adjournment, and with the aid of the legislative reference bureau make a thorough study of legislative methods and report its recommendation to the next session of the legislature. Five hundred dollars was appropriated for expenses.

The joint committee held a series of meetings, selected the director of the reference bureau as its secretary and made a unanimous report of forty-eight pages to the legislature of 1915, known as bulletin no. 4 of the Nebraska legislative reference bureau, issued in May, 1914.

Leaders in the political parties presented the main points in this printed report to the state conventions of 1914 and secured platform declarations in their favor. Many legislative candidates pledged themselves to these reforms.

When the legislature of 1915 met, the house adopted the principal features of the reform program. The senate adopted it in part. There were objections from spoilsmen and reactionaries, but the main points of improved enrollment and engrossment by typewriter, economy in employees, daylight committee meetings and some other points were established.

When the legislature of 1917 assembled it was resolved to concentrate effort upon the weakest point in the legislative procedure of Nebraska as well as other American states. Competent bill drafting and thorough revision of bills before introduction was that point. In this again the house responded to the reform movement, while the senate lingered behind. In the house a committee was appointed consisting of the speaker, the chief clerk and the director of the reference bureau with authority to revise bills after first reading and before second reading and printing, correcting bad form and making other changes with the consent of the introducer of the bill. The final report of this committee showed that out of 803 house bills 114 were found defective, or 14 per cent. The report further found that out of 331 senate bills 137 were defective, or 41 per cent. The examination of senate bills was made

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for the purpose of ascertaining how far the senate bills needed revision, the senate having failed to adopt a resolution similar to that adopted in the house. The legislative reference bureau drafted about 60 per cent of all the bills introduced, but a considerably larger per cent of house bills than senate bills.

The important features of legislative reform recommended by the joint committee and adopted by the legislature of 1915 include the following:[1]

A. Bills.

1. Printed form changed from $8\frac{1}{2}$ by 14 to $8\frac{1}{2}$ by 11, with material increase of printed matter on each page.

2. Amendatory bills printed to show new matter proposed, old matter omitted and old matter retained.

3. Enrolling and engrossing done by typewriter instead of pen and ink.

4. Free bill drafting and better conveniences for drafting bureau of legislative reference bureau.

5. Introduction of bills by members willing to defend them and favorable reports on bills only when majority of the committee are willing to defend them.

The effect of the above changes has been to increase very greatly the convenience and accuracy of legislative work and greatly decrease its cost.

B. Publications.

1. Daily printed journal adopted by the house, rejected by the senate.

2. Cumulative and final indexes of bills were prepared and published during the session by the legislative reference bureau.

The index of bills is the most popular public document during the legislative session, saving days of time for the members and the public.

C. Committees.

1. Committees were reduced as follows:

Senate, 42 committees with 255 members to 28 committees with 168 members; house, 47 committees with 496 members, to 30 committees with 248 members.

[1] In summarizing the procedural changes and their results use is made of the statement prepared by Myrtle Keegan Mason for bulletin no. 12 of the Nebraska legislative reference bureau. This bulletin is now in the hands of Congressman Reavis of the First Nebraska District for publication as a United States document.

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2. Committee meetings set daily in the house from 3 to 6 p.m.; in the senate, all Thursday afternoon and from 4 p.m. on other legislative days.

3. Committee schedules were arranged and printed so as to permit full attendance at committee meetings with no conflicts.

4. Records kept in committee meetings, and in the house this record made a part of each report on bills and printed in journal.

5. Final action upon bills taken only in regular daylight hours of committee meetings.

Without any known exception all the members of the senate and house familiar with the old committee methods and with the new are unanimous in expression of approval for these changes in committee work.

D. Employees.

1. The senate reduced its employees from 71 to 50. The house reduced from 71 to 33. The saving by the senate in employees' wages over the preceding session was $6,698.60. The saving by the house was $19,618.16, a total saving of $26,316.76.

2. A check established on overtime and extra pay of employees.

3. A strong committee on employees in the house proved effective in securing better efficiency and economy.

The hardest point to establish and maintain in any public reform is that of service as the sole requisite for a place on the pay roll. It is agreed by practically all the members of the legislature that the work is done fully as well now as when there were two or three times as many persons on the pay roll. The adoption of the reform report by the house and its partial adoption by the senate have established a new standard and tradition respecting legislative work. The mere saving in cash is worth all the fight, and the saving in sense of general responsibility for honest government is still greater.

In addition to the above program of reform in legislative procedure the joint committee report recommended a budget law, a civil service law, an efficiency survey, consolidation of offices and a single house legislature. The legislature of 1915 passed a budget law making the governor chief budget officer and requiring the auditor to tabulate quarterly and give to the press a brief statement of the state expenses with comparisons. The present auditor has set a new standard under this law by presenting a clear and intelligible statement of the state expenditure suitable for popular understanding. Some improvement has been made by the governor's budget, but as yet no thorough study as contemplated by the act.

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An efficiency survey act was passed by the legislature of 1915 and vetoed by the governor. A few consolidations of state departments have been made. A general civil service law for state employees has failed in the legislature, but the state board of control has made great progress in placing the sixteen state institutions under its charge upon a civil service basis.

Sentiment for the single house legislature is growing rapidly in Nebraska. The last two or three state senates have converted thousands of voters to the proposition. The Farmers Coöperative and Educational Union with a membership of 35,000 in the state unanimously approved the abolition of the state senate at its state convention January, 1918.

At the November election of this year Nebraska voters will cast their ballots for and against a constitutional convention, with good prospects for the convention.

The legislature of 1917 held the ground won by that of 1915 in the matter of legislative procedure, and made a gain in the direction of revision of bills.

ADDISON E. SHELDON.
Director Nebraska Legislative Reference Bureau.

Pensions for Public Employees. In recent years there has been much legislation relating to pension systems for public employees. The pension systems established by such legislation have, with but few exceptions, been financially unsound in that no adequate provision has been made to procure or accumulate the funds necessary to pay the proposed pensions, nor has there been a general appreciation of the enormous ultimate cost of the pension systems created.

Although at their latest sessions, a number of states (including California, Colorado, Illinois, Minnesota, Nebraska, New Jersey, and New York) enacted further legislation of the same general character as that just described, there were passed in 1917 a few laws that represent distinct advances in the direction of sound pension plans. Thus, the act of the New York legislature relating to the teachers' retirement fund of New York City and the act of the Pennsylvania legislature establishing a public school employees retirement system for the state of Pennsylvania provide pension systems that promise to be permanent institutions. These systems are so constructed that the payment of the retiring allowances is to be made under careful actuarial supervision, of such a nature that funds are provided for all the pensions promised.

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Under each of these systems the retiring employee receives a retiring allowance consisting of two parts, designated in the New York law as "annuity" and "pension." By this usage of the terms annuity and pension, it is understood that the annuity is derived from the contributions of the employee while the pension is from contributions of employer. In the Pennsylvania law, the same distinction is really made by calling one part "a teachers' annuity" and the other part a "state annuity." A distinction of this kind was also made in the 1913 law of Massachusetts creating a pension system for teachers. The recent New York and Pennsylvania laws, like the Massachusetts law of 1913, keep individual accounts, showing the contributions of each employee and the accumulations of his funds from interest earnings. These accumulations are a savings fund with which an annuity is procured at the time of retirement. The New York and Pennsylvania laws require payments by the employer into a contingent reserve fund so as to make the necessary funds available at the time of retirement to pay the pensions promised from contributions of the employer. Moreover, the city of New York in the case of New York teachers, and the state of Pennsylvania in the case of its school employees, guarantee 4 per cent interest compounded annually on all funds contributed by the employees. They further guarantee the payment of the pensions according to the provisions of the acts by stating explicitly in the laws that the payment of these retiring allowances is made in the one case an obligation of the city of New York, and in the other case an obligation of the state of Pennsylvania.

In starting a pension system on a reserve fund basis, great difficulty arises from the fact that no funds are available on behalf of present employees. The situation would be very much easier to deal with if we had to consider only new entrants into the service. It is interesting to note that the city of New York is to pay $1,000,000 annually into the fund on account of present teachers, until the fund is in a satisfactory condition as shown by actuarial valuation. Similarly, on account of the present school employees of Pennsylvania the state is to pay semi-annually into the fund an amount equal to 2.8 per cent of the total compensation paid to all contributors for service during the preceding school year, and in every case an amount at least 3 per cent greater than the second preceding semi-annual payment. This is to be continued until the accumulated reserve is adequate, when added to future contributions, to meet future demands on the funds. These plans of the state of Pennsylvania and of New York City put the pension systems on a basis analogous to legal reserve life insurance. The plans appear on first reading to be unnecessarily complex, but it should

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be said in this connection that very often what appear to be simple provisions are actuarially impractical, whereas the statement that is most satisfactory and convenient for practical operation on an actuarial basis may require for precision a rather complex phraseology.

It is the aim in the law for New York City teachers to provide at the age of 65, or after 35 years of service, a retiring allowance of about one-half the average salary, and to provide that one-half of this retiring allowance is an annuity purchased with the accumulated contributions of the teacher, and the other half is to be the pension paid from contributions by the city. There is, however, some flexibility to the amount of the annuity, as the accumulated contributions depend on the salary experiences of particular men. The practical result is that the amount of the annuity is simply the actuarial equivalent of the accumulated contributions, and may differ somewhat from the estimated 25 per cent of average salary. In the law of Pennsylvania, the retirement age is fixed at 62, and the state annuity is 1/160 of the final salary for each year of service prior to the age of 62 years. The "teachers' annuity" is similar to that of New York City in that it is the actuarial equivalent of the accumulated contributions.

In taking account of recent legislation dealing with pensions for public employees, it is significant that the state of Illinois has a commission working on this subject. A first commission presented a carefully prepared report to the 1917 session of the legislature. The report gave, among other things, the results of an actuarial investigation of the condition of the main funds of Illinois. With possibly one minor exception, these funds are grossly insolvent when judged from the point of view of comparing the cost of anticipated pensions with the funds to be expected from present sources of revenue. The report also dealt with the underlying principles of a sound pension plan, and put forth a tentative model plan. The commission, however, recommended only certain temporary legislation, as it found the problem too big and difficult to evolve a permanent pension policy in the few months at its disposal. The legislation enacted for Illinois in 1917 is, in general, in accord with the recommendations of the commission, with respect to increasing somewhat the contributions of employees, and with respect to providing additions to the funds by increased taxation, without increasing the benefits offered. There is one important exception to the statement about not increasing benefits in that the benefits to the higher officials of the Chicago police were increased. The legislature of 1917 created a second Illinois pension laws commission, to continue the study of the problem with a view to formulating a pension policy and to recommending permanent pension legislation.

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While as already indicated, there was in 1917 considerable legislation of the kind that takes little or no account of the future ultimate costs of the pensions that are authorized, it is fair to say that some of the legislation mentioned above offers decided encouragement to those who are interested in sound pension plans.

H. L. RIETZ.

University of Illinois.

Constitutional Amendments and Referenda Measures, 1917. During 1917 the Massachusetts constitutional convention, which convened June 6 and adjourned November 28 to meet again in the summer of 1918, held first place in interest and importance among the endeavors to revise or rewrite state constitutions. The convention was in session for practically six months and during that period passed three amendments for submission to the people at the last November election and a fourth amendment relative to the initiative and referendum for submission to the people at the next November election. At the adjournment of the convention some 331 measures had been considered; 24 measures were before standing committees; 235 measures were before the committee of the whole; 29 resolutions had been favorably reported by committees; and 47 proposals had been rejected by the convention.

The convention shortly after convening approved the plan to submit each proposed change in the constitution separately to the electorate. Three such changes were placed on the 1917 ballot and in each case adopted by large majorities. One amendment provided that the general court shall have power to enact a law enabling voters, absent at the time of an election from the city or town of which they are inhabitants, to cast their vote for all officers to be elected or upon any question to be submitted at such an election. A second amendment provided that the commonwealth and the cities and towns of the state may take and provide for their inhabitants, in such manner as the general court shall determine, a sufficient supply of the necessaries of life, food and shelter during times of war, public exigency, emergency or distress. Both of these measures, being emergency war measures, were passed with majorities of 155,196 and 209,293 votes respectively. A third measure, the so-called "Sectarian Amendment," provided that no moneys shall be appropriated by the commonwealth for the support of common schools other than those which are conducted under the order and superintendence of the authorities of the town or city in which the money is expended, and no grants of land shall be made to any schools or institutions wherein any denominational doctrine is inculcated, or which are not publicly owned or under exclusive control

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of public officers of the state or federal government. This amendment was bitterly fought in the convention and the adoption was by a majority vote of 75,972. The convention adopted a state-wide initiative and referendum amendment on November 28—too late to be voted on at the 1917 election. This one measure occupied a very large part of the time of the convention during its 1917 session.

The Arkansas constitutional convention which met November 19, 1917, at Little Rock, was in session only three days for organization purposes and adjourned to meet July 1, 1918. The various committees are working during this interval in formulating a draft of a new constitution to be submitted to the convention upon its reconvening. Tennessee voted at a special election held July 28, 1917, on the advisability of holding a constitutional convention, but the proposal was defeated by a large majority. A similar measure had also been defeated at a special election held in 1916 in Tennessee. The act of the Indiana legislature of 1917 providing for the election of delegates to a constitutional convention to convene January 8, 1918 was, declared unconstitutional by the Indiana supreme court.

The question of woman suffrage was before the voters of three states in 1917, viz., New York, Ohio, and Maine. The New York amendment granting full suffrage to women was adopted by a majority vote of 102,353. The proposal to enfranchise women had previously been rejected in New York state in 1915 by a majority of nearly 200,000 votes. In Ohio the referred statute granting presidential suffrage to women was decisively beaten by a majority of 146,120. Suffrage in the same state was voted down by a majority of 182,905 in 1914. The woman suffrage amendment presented to the voters of Maine at the September election drew a very small vote, as did the four other amendments in that state, and was defeated by 18,234 votes.

Prohibition was voted on in three states and adopted in New Mexico by a majority of 16,585. The vote in Iowa at a special election held October 15, 1917, was very close, the drys being defeated by only 662 votes. In Ohio the prohibition question has been kept actively before the people since 1914, when it was lost by 84,152 votes. In 1915 the drys were again defeated by 55,408; but in 1917 the majority against prohibition was reduced to 1,137 votes.

Two amendments in Maine, providing for the removal of sheriffs by the governor and for a new apportionment of representatives, carried, while two others, providing for the division of towns into polling places and relating to military organization, failed.

An advisory vote, taken to instruct the representatives in three representative districts in Massachusetts as to the advisability of estab-

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lishing a state system of old-age pensions, was decidedly favorable in all three districts. Pursuant to an act of 1913, the sixth, twelfth and seventeenth Suffolk representative districts (being wards 6, 12, and 17 of the city of Boston) voted by a majority of over five to one urging their representatives to support such legislation. In 1916 wards 9,

Vote on constitutional amendments and referenda measures, 1917

SUBJECT	STATE OR DISTRICT	VOTE	
		For	Against
Absent voting	Massachusetts[1]	231,905	76,709
State and municipal control	Massachusetts[1] (over necessaries of life)	261,119	51,826
School moneys	Massachusetts[1] "Sectarian Amendment"	206,329	130,357
Constitutional convention	Tennessee[2] special election July 28, 1917		
Woman Suffrage	Maine[3]	20,604	38,838
Woman Suffrage	New York[3]	703,129	600,776
Woman Suffrage	Ohio[4] presidential	422,262	568,382
Prohibition	Ohio[5]	522,590	523,727
Prohibition	New Mexico[3]	28,732	12,147
Prohibition	Iowa[3] special election October 15, 1917	214,963	215,625
Sheriffs	Maine[3] removal by governor	29,584	25,416
Apportionment	Maine[3] representatives	22,013	21,719
Elections	Maine[3] polling places	22,588	24,593
Military organization	Maine[3]	20,585	23,912
Old-age pensions	Boston, ward 6[6]	1,588	221
Old-age pensions	Boston, ward 12[6]	1,858	322
Old-age pensions	Boston, ward 17[6]	2,059	406

[1] Constitutional amendment referred by constitutional convention.
[2] Act referred by legislature.
[3] Constitutional amendment referred by legislature.
[4] Statute referred by petition.
[5] Initiated constitutional amendment.
[6] Submitted by legislature for advisory vote to instruct representatives.

10, and 11 of the city of Boston and also New Bedford returned a favorable vote of sentiment on this same question, the majority being slightly over four to one. The same proposition was adopted by a vote of nearly four to one at the 1915 election by the cities and towns of Brockton, Cambridge, Lawrence, Methuen, Abington and Whitman.

ARTHUR CONNORS.

Constitutional Conventions. A New Hampshire constitutional convention, authorized by vote of the people in 1916, will meet on the

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first Monday of June, 1918. The election of 439 delegates took place on the second Tuesday of March of this year, the delegates being apportioned the same as representatives to the general court except that every town is entitled to have at least one delegate. Provision was made by the 1917 general court that all alterations or amendments should be voted on separately by the voters of the state unless the convention should be of the opinion that it is impracticable so to prepare and arrange them, in which case the amendments may be placed on the ballot as a whole or *en bloc*.[1]

A joint resolution, passed by the 1917 legislature of Nebraska, provided that at the election in November, 1918, there shall be submitted a question allowing the voters of the state to express their will for or against the calling of a constitutional convention to alter, change and amend the constitution of the state. It was further provided that any amendment to the constitution should be submitted separately to the electors when demanded by 25 per cent of the convention delegates.[2]

Illinois voters by means of a resolution adopted by the 1917 legislature will be afforded an opportunity at the 1918 election of expressing their sentiment as to the advisability of calling a constitutional convention.[3]

The 1917 legislature of North Carolina passed an act submitting to the voters at the regular November election in 1918 a call for a constitutional convention. At the same election 120 delegates, corresponding to the present apportionment of members of the house of representatives, are to be elected. If a majority of the electorate favors the convention, it will convene on the Wednesday after the first Monday in May, 1919, at which time it will sit for thirty days for receiving amendments, then adjourn for sixty days, returning at the end of that time to consider the amendments for another period of thirty days.[4]

The legislature of Idaho at its 1917 session also adopted a resolution submitting to popular vote at the general election in November, 1918, the question of calling a constitutional convention.[5]

Legislative efforts to provide for holding constitutional conventions in several other states including Oklahoma, Missouri, Washington and Kansas were unsuccessful in 1917.

ARTHUR CONNORS.

[1] Chap. 121, p. 609, Laws, 1917.
[2] H. R. No. 2, p. 580, Laws, 1917.
[3] S. J. R. No. 1, p. 805, Laws, 1917.
[4] Chap. 60, p. 114, Laws, 1917.
[5] S. J. R. No. 2, p. 505, Laws, 1917.

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JUDICIAL DECISIONS ON PUBLIC LAW

ROBERT E. CUSHMAN

University of Illinois

Amendment of State Constitution—Majority Necessary for Adoption. People v. Stevenson (Illinois, December 7, 1917, 117 N. E. 747). The constitution of Illinois provides that when amendments to that instrument are proposed by the legislature of the state they shall be submitted to the voters of the states "at the next election of members of the General Assembly, in such manner as may be prescribed by law . . . and if a majority of the electors voting at said election shall vote for the proposed amendment" they shall become a part of the constitution. A constitutional amendment relating to taxation was submitted to the people of Illinois at the general election in November, 1916. The vote upon it was 656,298 for, and 295,782 against. The number of male voters voting in the election was 1,343,381, while the highest vote cast for members of the general assembly aggregated 1,269,331. In other words the amendment received a majority of the vote cast for members of the general assembly but not a majority of the total male vote cast in the election for other officers. In this case the supreme court of Illinois was called upon to decide whether or not the amendment had received the majority which the constitution required. It decided that it had not. It based its decision upon the following grounds: A constitution gets its binding force, not from the convention which framed it, but from the people who ratified it. Accordingly its clauses must be construed in the natural, ordinary sense most obvious to the common understanding. The obvious meaning of the clause in question is that a majority of the highest vote cast at the general election shall be required to pass an amendment. This has been the interpretation which has been placed upon that clause in counting the votes upon all of the seven previous amendments adopted under the present state constitution, although in none of those cases did the amendment fail to get a favorable majority of the highest vote cast in the election. This interpretation is rendered all the more reasonable by the fact that under the system of minority representation used in Illinois it is

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frequently very hard to determine the amount of the total vote cast for the members of the general assembly.

Appropriations—Public Purpose—Aid by State. Alameda County v. Chambers (California, February 7, 1918, 170 Pac. 650). This case involves the right of the state to appropriate money to reimburse persons and counties for losses suffered by them by reason of a fire in one of the buildings of the state at the state fair in which they had placed exhibits. The action is brought here by a county and not an individual. The court said that if the legislature had not indicated in the law the purpose for which the money was being paid to the persons therein named, no constitutional attack could have been made upon it once it was approved by the proper state officer. Since the purpose was specified in the statute it must be subjected to judicial scrutiny. It is not an appropriation for a public purpose. This is true, because it is for the purpose of making compensation for property already destroyed, and the destruction of property does not promote any public interest. The grant cannot be regarded as a moral claim upon the state resting upon contract, because the law governing state fairs specifically forbids the state to incur any contractual liability in relation thereto. It is not a claim against the state based upon tort, as no negligence of any state officer has been shown. If such negligence could be shown, the fact that the state was carrying on a governmental function in running the fair would prevent the establishment of a tort liability. The appropriation is therefore clearly in violation of the clause of the constitution which forbids the state to make any gift to any individual, or municipal or other corporation.

Injunctions in Labor Disputes—Rights of Third Parties to Unionize a Shop. Hitchman Coal and Coke Co. v. Mitchell (U. S. Supreme Court, December 10, 1917, 38 Sup. Ct. 65). This case sustains an order making perpetual an injunction restraining the defendants, agents of the United Mine Workers of America, from continuing their efforts to unionize the plaintiff's mine. There was no agreement between the plaintiff and his employees as to a fixed time of employment, but the men had contracted not to join a union while in the employ of the plaintiff. It was admitted that no violence or intimidation had been used by the defendants in their efforts to organize a union in the mine. The court held that the plaintiff was entitled to injunctive relief for the following reasons: The plaintiff was quite within his rights in running

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his mine on a nonunion basis and he has valuable rights in the present satisfactory arrangement between himself and the men he employs. It is well recognized that it is an actionable offense to entice one's servants away without justifiable reason. There is involved here no question of the rights of the plaintiff's employees, since the defendants are not acting as their agents. Even if they were so acting the admitted right of the men to strike for a lawful purpose would not confer upon the defendants any right to instigate and promote such a strike. While it is true that men have a right to form a union and invite other persons to join it, that right is not absolute but must be exercised in conformity with the admitted rights of others. In this case the right to form a union was being exercised in a way most hurtful to the plaintiff, and the methods employed could not be regarded as a fair exercise of the right to form a union. The defendants were engaged in an effort to persuade the plaintiff's workmen to violate the terms of their contracts with him. Mr. Justice Brandeis filed a dissenting opinion, in which Mr. Justice Holmes and Mr. Justice Clarke concurred. The dissenting justices held that no right of the plaintiff had been infringed. It was pointed out that to induce men to join a union with the purpose of ordering a strike thereafter is no more subjecting the employer to illegal coercion than that to which the plaintiff has subjected his employees in compelling them to agree not to join the union under penalty of losing their employment. Enticing employees away from their master is actionable only if done for unjustifiable purposes, and the purpose here controlling, that of strengthening the union and increasing its bargaining power, must be regarded as legitimate.

Interstate Commerce—Regulation by the State—Distribution of Coal Cars. State Public Utilities Commission v. Baltimore & O. S. W. R. Co. (Illinois, December 19, 1917, 118 N. E. 81). The carrier in this case was an interstate railroad and had adopted a rule in the case of car shortage that the mines which it served should receive cars in proportion to their daily shipments during the month of the year in which their shipments were largest. This operated unfairly against the Illinois mine owners and in favor of the eastern mines. The Illinois public utilities commission accordingly ordered the railroad to abandon their plan of car distribution, and comply with the provisions of an Illinois statute which required that in case of a car shortage the available cars should be "distributed among the respective applicants therefor in proportion to their respective immediate requirements without dis-

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crimination between shippers, localities or competitive or noncompetitive places." The supreme court of Illinois decided that the commission did not have power to issue this order. It was permissible for the state authorities to take proper measures to compel the carrier to furnish cars at points within the state within a time which, in the light of the demands of interstate commerce, is reasonable, inasmuch as the state and federal governments have concurrent authority to enforce the obligations of an interstate carrier. But when the interstate carrier has adopted a rule which it administers fairly among applicants, the authority to determine whether that rule is reasonable or not rests with the interstate commerce commission.

Intoxicating Liquors—Validity of Statute Prohibiting Possession for Personal Use. Crane v. Campbell (U. S. Supreme Court, November 15, 1917, 38 Sup. Ct. 98). A statute of Idaho, February 18, 1915, made it unlawful for any person to have in his possession for personal use in certain prohibition districts any intoxicating liquors. This law was held constitutional by the supreme court of Idaho. In re Crane, 27 Idaho 671; 151 Pac. 1006. The Supreme Court of the United States, affirming this decision in the present case, held that the statute did not abridge the privileges or immunities of citizens of the United States, nor deprive any person of liberty or property without due process of law. It has been well established for many years that a state has a right so to exercise its police power as absolutely to prohibit the manufacture, sale, gift, or purchase of intoxicating liquors within its borders. It must, therefore, follow that the state has the authority to employ "such measures as are reasonably appropriate or needful to render the exercise of that power effective." In view of the known difficulties incident to the adequate enforcement of prohibition statutes the court is unable to say that it was unreasonable or arbitrary for the state to forbid entirely the possession of intoxicating liquor, inasmuch as such a measure seems a reasonable method of suppressing the forbidden traffic. The right to possess liquor for personal use is not one of the fundamental privileges of a citizen of the United States which no state may abridge. "A contrary view would be incompatible with the undoubted power to prevent manufacture, gift, sale, purchase or transportation of such articles—the only feasible ways of getting them."

Lending Credit of State—Constitutionality of Investing School Funds in Farm Loans. People v. Higgins (Colorado, November 5, 1917,

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168 Pac. 740). A statute of Colorado provided that the school funds of the state should be invested in certain securities including loans upon unencumbered farm lands. Such loans were to be secured by first mortgages. In case of the necessity of foreclosure the state was to bid the property in at the foreclosure sale and reimburse the school fund by taxation. This act does not conflict with the constitutional provisions requiring the safe investment of public funds and forbidding the state from becoming responsible for the liabilities of any person or corporation. The provisions of the statute are such as to secure the state from loss. Nor does it violate the clause which forbids the granting of special privileges, immunities or franchises, since there are several kinds of securities in which the funds may also be invested, and the statute merely provides a reasonable and necessary classification of them.

Minimum Wage—Constitutionality. Williams v. Evans (Minnesota, December 21, 1917, 165 N. W. 495). An act of Minnesota of 1913 established a minimum wage commission and forbade any employer to pay to women and minors less than the minimum wage which might be fixed by such commission. At its discretion, or on request of not less than 100 employees, in an occupation where women and minors are employed, the commission was empowered to conduct an investigation with public hearings. If the investigation showed that less than living wages were being paid to one-sixth or more of the women and minors in such occupation, the commission was authorized to establish a minimum wage which should be binding upon the industry involved. This law was attacked upon two grounds: First, it was urged that it violated the due-process clause of the fourteenth amendment, as interfering with the freedom of contract of employer and employee. The court meets this objection with a familiar line of reasoning. The liberty of contract is not absolute. It may be abridged in the public interest by an exercise of the police power of the state. The police power, on the other hand, is not unrestricted but if "there is any reasonable basis for legislative belief that the conditions mentioned exist (alluding to the findings of various commissions that too low wages are dangerous to the health and morals of women and children), that legislation is necessary to remedy them, and that laws looking to that end promote the health, peace, morals, education, or good order of the people and are greatly and immediately necessary to the public welfare," then the courts will not interfere with such an exercise of legislative

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power. In regard to the problem of minimum wages for women and minors the court finds the basis for such legislative belief. The act, therefore, is not a violation of due process of law. Second, it was alleged that this statute delegated legislative power to the minimum wage commission and was accordingly void. The court does not accept this view. It finds the law complete in itself and points out that it merely vests in the commission certain "discretion as to its execution to be exercised under and in pursuance of the law." Other minor objections are disposed of without argument and the law is held to be constitutional.

Municipal Corporations—Constitutionality of Optional Charter Law. Cleveland v. City of Watertown (New York, December 21, 1917, 118 N. E. 500). In this case the court of appeals of New York reversed the decision of the appellate division of the supreme court (Cleveland v. City of Watertown, 165 New York Supp. 305) declaring invalid the optional charter law of 1914. Under the provisions of this law the city of Watertown had voted to accept the city manager plan of organization. The decision of the lower court is reversed upon every substantial point. There is no delegation of legislative power, because the statute is complete as it leaves the hands of the legislature, and the forms of municipal government for which it provides are also complete. It is legitimate to allow the voters of a city to determine whether or not they will avail themselves of its provisions. The act is not void by reason of the large authority given to the city council to enact ordinances to replace the ones previously in force, since the powers given to the council are not in excess of those which the city may legitimately exercise. In permitting the city to regulate matters of police, charities, health, and tax assessment, matters which are vital to the state at large, the legislature has not overstepped its power to provide for the proper administration of these matters by local officials, a power long established. The opinion concludes with the statement that "the whole trend of modern thought and recent legislation is toward vesting in each municipality the management of its local affairs, and I have been unable to discover any valid reason why the present act, which is a step in that direction, should not be given a fair trial without interference from the court."

Negro Segregation—Power to Create Exclusive Residence Districts for White and Colored People. Buchanan v. Warley (U. S. Supreme Court, November 5, 1917, 38 Sup. Ct. 16). An ordinance of the city of

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Louisville, Kentucky, made it unlawful for colored persons to occupy as residences houses located in blocks in which the majority of residences are occupied by white persons. A similar rule applied to the occupation by white persons of residences in the so-called colored blocks. This ordinance was held constitutional by the Kentucky court of appeals (Buchanan v. Warley, 165 Ky. 559, 177 S. W. 472). The present case reverses this decision and holds that such an ordinance is in violation of the prohibitions of the fourteenth amendment. This is a clear case of taking property without due process of law. Property is more than the mere thing possessed, but includes the right to acquire, dispose of, and use it. This ordinance makes the free enjoyment of the right to occupy, use or dispose of property contingent upon the color of the persons who are to reside upon such property. The purpose of the fourteenth amendment, the early cases construing it, as well as various acts of Congress supplementing it, all indicate that its provisions are adequate to secure the fundamental rights of property upon the same terms to citizens regardless of their race or color. The court examines several cases in which laws discriminating against the negro have been upheld. In the case of Plessy v. Ferguson (163 U. S. 537, 16 Sup. Ct. 1138), a state law requiring railroads to provide "equal but separate accommodations" for the white and colored races was found constitutional. In Berea College v. Commonwealth (211 U. S. 45, Sup. Ct. 33), a statute requiring race segregation in schools and colleges was sustained; but in each of these cases as well as in many similar ones no property rights were interfered with. There was merely a "classification of accommodations upon the basis of equality for both races." Although the ordinance in this case was declared to be passed for the purpose of "preventing conflict and ill-feeling between the white and colored races . . . and to preserve the public peace and promote the general welfare" it cannot be sustained as a legitimate exercise of the police power in view of its obvious violation of fundamental constitutional rights.

Postal Privileges—Right of State to Exclude Game from Parcel Post. Ex parte Phoedovius (California, January 17, 1918, 170 Pac. 412). A California statute of July 27, 1917, made it a misdemeanor for any person to ship wild birds, wild animals, or fish by parcel post. If such game is once deposited in the parcel post it is at once subject to the exclusive control of the federal postal authorities and cannot be reached by state officials in an effort to enforce the game laws of the state. Accordingly the state has forbidden game to be put into the parcel post in order that it

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may not get beyond state control. This case decides that the law is valid. It does not deprive any person without due process of law of a property right to ship game through the mails since there is no unqualified property right to possess or dispose of wild game. It is well established that the state has full control over all wild game within its borders and may declare the terms under which any person may acquire possession of it. Nor does this law unduly interfere with interstate commerce. This point was well covered by the Supreme Court of the United States in Geer v. Connecticut, (161 U. S. 519, 1896), which upheld a state law forbidding any person to transport over the state line game killed in the state. It was there pointed out that such game "can never be the object of commerce except with the consent of the state and subject to the conditions which it may deem best to impose." The same reasoning adequately answers the argument that the law in this case interferes with the postal service. Such interference with the postal service or with interstate commerce as may be involved is too remote to render invalid a reasonably necessary exercise of the police power of the state.

Railroad Rates—Power of Interstate Commerce Commission Over Intrastate Rates to Prevent Discrimination Against Interstate Commerce. Illinois Central R. Co. v. Public Utilities Commission (U. S. Supreme Court, January 14, 1918, 38 Sup. Ct. 170). A statute of Illinois established an intrastate passenger rate of 2 cents per mile. The interstate commerce commission authorized an interstate rate of 2.4 cents between points in Illinois and various points outside that state. With these two rates in effect serious discrimination was shown to exist against St. Louis, Missouri, and Keokuk, Iowa, in favor of the Illinois cities situated just across the Mississippi River from them. Accordingly the interstate commerce commission issued an order forbidding the twenty-nine carriers involved to charge a higher rate per mile from St. Louis and Keokuk to points in Illinois than was charged from the Illinois cities opposite St. Louis and Keokuk to the same points in Illinois. The carriers forthwith raised all their intrastate rates in Illinois to 2.4 cents per mile so that the discrimination complained of would be abolished. This action brought them into conflict with the state authorities for violating the state two cent rate law.

The present case involves the validity of the order of the interstate commerce commission referred to. The order was held void, not because of lack of power in the commission to issue an order of that kind,

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but because the order was too vague and uncertain in meaning to be operative. If the discrimination against the two complaining cities had been found to be state-wide so as to necessitate the increase of all the intrastate rates in Illinois there would seem to be no doubt as to the power of the commission to order such an increase. See Houston, East & West Texas Ry. Co. v. United States (234 U. S. 342, 34 Sup. Ct. 833). The commission might also have indicated definitely the precise points between which the corrective rates must apply, so that the discrimination might be eliminated. It did neither of these things but rather it issued an order so vague as to the territory and points to which it applied as to afford no justification for a violation by the carriers of the state statute which the order was designed to override.

Recall of Judges—Petition for as Contempt of Court. Marians v. People (Colorado, December 3, 1917, 169 Pac. 155). The constitution of Colorado provides for the recall of judges and authorizes the circulation of petitions setting forth for the enlightenment of the voters the grounds on which the recall is sought. Such a petition, containing truthful statements regarding the conduct of a judge, even in a case still pending before the court, is privileged matter. Its circulation cannot be punished as contempt of court. This is analogous to the rule which regards as privileged matter the petition asking a court for a change of venue. Obviously the right to recall a judge would be destroyed if those seeking to exercise it could be fined and imprisoned for contempt for the act of circulating the petition for recall. While the legislature may not wantonly interfere with the right of a court to punish for contempt, that right may be abridged by a provision of the state constitution.

Strikes—Picketing—Validity of Municipal Ordinance Forbidding. Hall v. Johnson (Oregon, December 27, 1917, 169 Pac. 515); Ex parte Stout (Texas, November 21, 1917, 198 S. W. 967). In the first of these cases is involved the validity of an ordinance of the city of Portland prohibiting "conspiracies to injure trade, business or commerce." The terms of this ordinance were broad enough to forbid strikes or incitement to strike, and boycotts whether primary or secondary, while peaceful picketing was made *prima facie* evidence of the forbidden conspiracy. The present case discusses only the provisions relating to strikes and picketing. The court finds no judicial authority for the position that a strike *per se* is unlawful while there is much precedent and argument

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to support the view that workmen may peaceably stop work singly or in a body. There is no discussion here of the motives or purposes for which the right to strike may be employed. The anti-strike clause is declared to be "unreasonable and void, as against public policy."

While admitting that an ordinance making picketing illegal is not necessarily invalid, the court holds that there is not enough logical connection between the acts of picketing described in the ordinance and the criminal conspiracy forbidden to warrant making those acts *prima facie* evidence of such conspiracy. Accordingly the anti-picketing clause is invalid.

In the case of Ex parte Stout, an elaborate and sweeping anti-picketing ordinance of El Paso, Texas, was attacked as unconstitutional, as an interference with freedom of speech and a denial of due process of law under the fourteenth amendment. The defendant had merely walked up and down in front of a restaurant bearing a sign denouncing the restaurant as "unfair." The court indicates that the right of the city to control the use of its streets serves as the basis for many limitations upon free speech which would otherwise be unconstitutional. The act of picketing has been held by numerous authorities to be an unjustifiable interference with the business of others inasmuch as its inevitable tendency is to coerce and intimidate prospective patrons of the picketed establishment. Forbidding it is therefore a proper exercise of the police power of the municipality.

War Problems. *Conscription Act—Constitutionality.* Arver v. United States (U. S. Supreme Court, January 7, 1918, 38 Sup. Ct. 159); United States v. Stephens (U. S. District Court, November 13, 1917, 245 Fed. 956); Angelus v. Sullivan (U. S. Circuit Court of Appeals, October 22, 1917, 246 Fed. 54). The decision of the United States Supreme Court upholding the constitutionality of the conscription, while treating with some care a few of the arguments urged against the law, deals with scant courtesy with most of them. The opinion may be summarized roughly as follows: First, the admitted power of Congress to raise armies carries with it the power to compel men to serve in such armies. Second, it is no argument against the law that its effect is to make state citizenship subordinate to federal citizenship by rendering it impossible for men to give their service to the state. Such subordination of state citizenship was within the intention of the Constitution from the first and was reaffirmed by the fourteenth amendment. Third, that compulsory military service is not a gross violation of the inherent principles

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of a free government is shown by its almost universal acceptance at the present time, by its long history, and by much reputable judicial authority. Fourth, the clauses in the Constitution regarding the state militia and the power of Congress over those bodies are entirely separate from the clauses relating to the power of Congress to raise and equip armies and the limitations placed upon the former do not in any way affect the latter. Fifth, no merit is found in the attacks made upon the administrative features of the law; it does not improperly delegate federal authority to the states, nor does it delegate legislative or judicial power to administrative officials. Finally, the claims that the conscription act, in exempting from its operation certain religious sects as well as the clergy and theological students, creates an unconstitutional establishment of religion, and the contention that it violates the thirteenth amendment by imposing involuntary servitude are passed over without argument as being beneath the dignity of an answer.

The opinion in Angelus v. Sullivan adds nothing of importance to the discussion of the constitutionality of the conscription act; but in United States v. Stephens somewhat careful consideration is given to the contention that the act creates an establishment of religion, and also to the argument that the members of the national army cannot be sent outside the United States for military service. Needless to say both cases uphold the act.

Conscription Act—Custody of Drafted Man Serving Prison Sentence. Ex parte Calloway (U. S. District Court, November 13, 1917, 246 Fed. 263). A writ of habeas corpus is denied in this case to a man who was held in prison by the state authorities for an offense committed subsequent to his enrollment in the draft. Upon being ordered to report for military service he sought release from prison in order to comply. It was held that he was legally kept in prison and could enter the national army only at the expiration of his term.

Conscription Act—Release From Enlistment in Regular Army as Ground for Exemption. Ex parte Cohen (U. S. District Court, October 17, 1917, 245 Fed. 667). A man is not exempt from the draft because he previously purchased his release from the regular army in which he had voluntarily enlisted. The fact that he was honorably discharged from service for a money consideration cannot be regarded as an implied agreement that he should be exempt from the draft, since Congress alone has authority to determine the grounds upon which exemption from the draft may be claimed.

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Conscription Act—Status of Aliens—Jurisdiction of Courts to Review. Angelus v. Sullivan (U. S. Circuit Court of Appeals, October 22, 1917, 246 Fed. 54, 62); Ex parte Hutflis (U. S. District Court, October 19, 1917, 245 Fed. 798); United States v. Finley (U. S. District Court, November 3, 1917, 245 Fed. 871); Ex parte Beck (U. S. District Court, September 29, 1917, 245 Fed. 967). In the first of these cases the court declares that, while an alien is not subject to the draft, the decision of the draft exemption boards upon the question of fact as to whether or not a man is an alien is final, except in cases where the board has not given the person involved a fair chance to be heard and present evidence. No such procedural defects were found in the action of the board in the case before the court.

The lower federal courts are not in agreement upon the question whether persons are automatically excluded from the draft when it is shown that they are aliens, no matter how the fact of alienage may have been established, or whether alienage merely forms a possible basis for exemption if properly pleaded in accordance with the regulations provided by law. In the Beck case the court takes the former view that an alien is *ipso facto* exempt, and that the exemption boards must exclude aliens no matter how they find out the fact of their alienage. In this case the fact of alienage was not denied, but the claim for exemption on that ground was not made within the period specified by the law. The court took the view that the board had no power over an alien and must exclude him from the draft even though he might wish to serve and, *a fortiori*, they should exclude the alien who wished to be exempted but who had in good faith failed to meet the procedural requirements of the law. This view is repudiated in United States v. Finley and Ex parte Hutflis. In these cases it was held that the exemption of aliens depended upon a strict compliance with the rules and regulations governing the filing of claims for such exemptions. An alien cannot get exemption without claiming it in due form.

Conspiracy to Obstruct Conscription—Elements of the Offense. Goldman v. United States (U. S. Supreme Court, January 14, 1918, 38 Sup. Ct. 166); United States v. Galleanni (U. S. District Court, October 9, 1917, 245 Fed. 977); United States v. Bryant (U. S. District Court, September 13, 1917, 245 Fed. 682); United States v. Baker (U. S. District Court, July 11, 1917, 247 Fed. 124). In the first of these cases the Supreme Court of the United States reiterates the well established rule that the crime of conspiracy is complete even though the plans of

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the conspirators are wholly unsuccessful. The fact that the defendants conspired to induce persons to evade the obligations of the conscription act brought them within the penalties of the penal code, although the government could point to no person who had been induced by their efforts thus to violate the law. United States v. Galleanni holds that soliciting and urging people not to register for the draft is punishable as a conspiracy to defraud the United States inasmuch as it was a conspiracy to deprive the government of a right to which it was entitled. In United States v. Bryant the defendants had conspired forcibly to resist the operation of the conscription act but their conspiracy and all the overt acts done in furtherance of it took place before the conscription act was passed by Congress. This was held nevertheless to be a conspiracy to offer forcible resistance to the authority of the United States. Nor does the fact that the scheme of the conspirators was "chimerical and utterly impossible of success" make it less a violation of the law. The government failed to convict the defendants in United States v. Baker because it was unable to prove definite intention on their part to persuade persons not to obey the conscription law. Such intention was not shown by a mere circulation of literature denouncing war and implying that a Socialist administration would have kept the country out of war.

Enlistment—Validity—Right of Recruit to a Fair Physical Examination.—Ex parte Blackington (U. S. District Court, October 17, 1917, 245 Fed. 801). The petitioner in this case enlisted in good faith in the national guard and was drafted into the federal service. It was shown that the army medical examiner passed him out of malice in spite of certain physical defects. This case holds that such a person has no right to demand his discharge from military service. The medical examiner acts solely for the government and is under no legal obligation to an applicant to give him a fair examination.

Enlistment of Minors—Right of Parent or Guardian to Claim Release. Ex parte Rush (U. S. District Court, November 13, 1917, 246 Fed. 172). The National Defense Act of June 3, 1916, provides that persons under eighteen years of age shall not be enlisted or mustered into the military service of the United States without the written consent of his parent or guardian provided that the parent or guardian has a legal right to his custody and control. In this case a boy of seventeen enlisted without the consent of his guardian and served for a year in the army. He

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then deserted, was arrested and held for court martial. His guardian asks for writ of habeas corpus on the ground that his enlistment was illegal, and that he cannot be held in the custody of the military authorities. The petition for the writ is denied upon two grounds. In the first place it is well established that the law requiring the consent of parent or guardian to the enlistment of a minor is intended not for the benefit of the minor but for that of the parent or guardian. The minor cannot on his own behalf set up the invalidity of his enlistment. Secondly, the parent or guardian must act within a reasonable time in asserting his claim to have the minor released from military service. Such action must at all events be taken before the minor has made himself amenable to military jurisdiction by a violation of military law. Two other recent cases lay down the same rule: Ex parte Dostal, 243 Fed. 664; Ex parte Foley, 243 Fed. 470.

Espionage Act—Validity of Provisions Concerning Seditious Publications. United States v. Pierce (U. S. District Court, November 7, 1917, 245 Fed. 878); Masses Publishing Co. v. Patten (U. S. Circuit Court of Appeals, November 2, 1917, 246 Fed. 24). It is held in the case of United States v. Pierce that the provision of the espionage act making it a crime for any person willfully to "make or convey false reports or false statements with intent to interfere with the operation or success of the military or naval forces of the United States" is not an unconstitutional abridgment of the freedom of speech guaranteed by the first amendment. There are well recognized limits to the freedom of speech. "Citizens have the right to criticize the existing laws, point out their defects, injustice, and unwisdom, and advocate their amendment or repeal; but they have no constitutional right to counsel, advise, encourage, and solicit resistance to the execution of or refusal to obey them."

In Masses Publishing Co. v. Patten the question is raised of the constitutionality of the clause of the espionage act excluding from the mails certain proscribed kinds of matter, such as that which advocates treason, insurrection or forcible resistance to the law. The court points out that the act in question does not forbid the publication of the matter excluded from the mails, nor its transportation in other ways than through the mails. There is no broad question of the freedom of the press raised. There is ample authority to sustain the exercise by Congress of the power to prevent the mails from being used as an agency to promote ends which it regards as dangerous or injurious.

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Such exclusion violates no property right and does not, therefore, amount to a denial of due process of law. The court also holds that the decision of the postmaster general in excluding such a publication for the mails is final unless it is clearly wrong. The burden rests upon those attacking such decision to show that it is wanton, malicious or in conflict with the preponderance of evidence.

Searches and Seizures—Unreasonable—Suspicion of Espionage. United States v. Premises in Butte, Montana (U. S. District Court, October 17, 1917, 246 Fed. 185). The officers of the federal government sought search warrants to enter and search certain premises on which they believed would be found evidence that the German subject there residing had been guilty of violating the espionage act. The warrants were refused. Mere suspicion is not enough to justify the search of a person's premises. The fourth amendment to the United States Constitution protects every person from unreasonable searches and seizures and the search contemplated in this case is unreasonable in view of the failure of the federal officers to show "probable cause" that a crime had been committed. The warrants must also be refused on the ground that the proposed search would amount to making the suspected person be a witness against himself since the forcible examination of private books and papers will constitute an infringement of the protection against self-incrimination.

Sedition—Right of State to Punish Interference with the War. State v. Holm (Minnesota, January 25, 1918, 166 N. W. 181). This case upholds the validity of a statute of Minnesota making it unlawful first, to discourage enlistment in the military or naval forces of the nation or state; second, to advocate in speech or writing that "the citizens of this state should not aid or assist the United States in prosecuting or carrying on war with the public enemies of the United States." The defendants circulated pamphlets attacking the conscription act, denouncing the President and Congress, and impugning the motives which led us to enter the war. In the first place, it is unnecessary to determine whether the pamphlet directly urged men not to enlist in the national service since the natural and reasonable effect of it is to deter men from doing so. Secondly, the fact that the war power has been confided to the national government does not preclude the states from forbidding their citizens to interfere with the raising of the national armies or the conduct of the war. Such state legislation must not conflict with federal

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law or hinder or impede its operation. The act in question does not so conflict with any federal law; its provisions supplementing and not interfering with the espionage act passed by Congress. The state is part of the nation and owes to the nation full support in time of war. It is proper for the state to require its citizens "to refrain from any act which will interfere with or impede the national government in effectively prosecuting the war against the public enemies." Lastly, this statute is not void by reason of its interference with the freedom of speech. There is no unrestrained freedom to say or print whatever one chooses. It is necessary that the government should forbid utterances and publications which imperil the national security or hinder the proper performance of its public duties.

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NEWS AND NOTES

EDITED BY FREDERIC A. OGG

University of Wisconsin

By vote of the executive council the next annual meeting of the American Political Science Association will be held at Cleveland, Ohio, during the week following Christmas. The exact dates remain to be determined. The American Economic Association will be in session in Cleveland at the same time.

In accordance with the vote of the executive council at its Detroit meeting, in November, a typewritten list of members of the American Political Science Association has been prepared. Copies may be had, on application to the secretary-treasurer, at 50 cents.

A separate department of political science has been established at the University of Kansas, with Professor C. A. Dykstra as chairman. Professors Hodder and Davis of the department of history continue for the present to offer certain courses in political science.

Professor Samuel N. Harper, of the University of Chicago, has given lectures, chiefly on the Russian revolution, at a number of middle western universities during the winter.

Professor Marshall S. Brown has been designated Dean of the Faculties at New York University, with a view to promoting coöperation among the several schools of the University. Professor Milton E. Loomis has been made chairman of the division of public affairs.

Professor Chester Lloyd Jones, of the University of Wisconsin, who is a member of a group of political scientists and historians engaged through the year in the study of the Mexican problem, spent part of the spring touring the United States and visiting Cuba in quest of auxiliary data.

W. F. Dodd, secretary of the Illinois legislative reference bureau, has been appointed major in the reorganized quartermaster's bureau of the department of war.

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Professor P. Orman Ray, of Northwestern University, will give courses in political science in the summer session of Columbia University.

The League to Enforce Peace announces a "Win the War for Permanent Peace" convention, to be held at Philadelphia May 16-18. There are to be sessions on "what democracy would face if it lost the fight," preparation for a league of nations, machinery of a league of nations, and uses of a league of nations.

Professor W. J. Shepard, of the department of political science of the University of Missouri, was granted leave of absence from January 1, 1918, in order to undertake national service, as a first lieutenant, assigned to field service in the civilian personnel division, ordnance bureau of the war department. Professor Eugene Fair, of the First District State Normal School, Kirksville, Missouri, has been appointed acting professor of political science in the University of Missouri and will have charge of Professor Shepard's courses during the latter's absence.

Dr. H. H. Powers, of the Bureau of University Travel, gave a series of five lectures on "War and Democracy" at the University of Missouri in February.

The Morton Denison Hull prize offered by the American Municipal League has been awarded, for 1918, to Mr. Robert D. Armstrong for an essay on the public service commission of Indiana. Mr. Armstrong is a graduate of Indiana University and received his master's degree last June at the University of Wisconsin. He has been appointed librarian and assistant secretary of the Indiana commission.

Mr. Robert E. Tracy has been called from Philadelphia to become director of the newly organized bureau of governmental research of Indianapolis. For three years Mr. Tracy has acted as the legal specialist on the staff of the Philadelphia bureau of municipal research, where he also has served as secretary to the board of trustees and as general assistant to the director and assistant director. He is editor of the judicial decisions department of the *National Municipal Review*.

Seven public lectures on "Aspects of the World War" were given during February and March at the Johns Hopkins University. Five were delivered by members of the faculty: "The Tradition of American

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Isolation," by Professor John H. Latané; "The Prussian Theory of the State" and "The Prussian Theory of Monarchy," by Professor W. W. Willoughby; "Medical Aspects of the War," by Dr. Winford H. Smith; and "The War and the Future of the Far East," by President Frank J. Goodnow. The remaining two lectures were: "The Germans in Belgium and France," by Professor Vernon L. Kellogg, and "Plans to Discourage War," by Mr. Theodore Marburg.

"Privileges and Immunities of State Citizenship," a dissertation by Dr. Roger Howell, will soon be issued from the Johns Hopkins Press.

The departments of political science of the University of Oregon, the Oregon Agricultural College, and Reed College are coöperating in writing a descriptive account of the present state and local government of Oregon. It is hoped that the study will be issued as a joint bulletin of the three institutions before the end of the year.

The fifth national foreign trade convention, organized under the auspices of the National Foreign Trade Council, was held at Cincinnati, April 18–20. The general subject for consideration was the part of foreign trade in winning the war.

The fifth annual meeting of the National Institute of Social Sciences was held at New York January 18. The papers related to reconstruction after the war, and included the following: "The General Principles of a Policy of Reconstruction," by Professor Thorstein B. Veblen of the University of Missouri; "Labor Reconstruction as a Result of the War," by John B. Andrews of the American Association for Labor Legislation; "Free Trade, an Essential Factor in Maintaining the Peace of the World," by George H. Putnam of the American Free Trade League; and "Immigration and the Foreign-born After the War," by Professor Henry P. Fairchild of Yale University. These papers, with others on post-bellum reconstruction, are to be published as Volume IV of the annual journal of the institute.

The United States Commissioner of Education has requested the American Political Science Association, the American Historical Association, the American Economic Association, the American Sociological Society, and the American Statistical Association to designate two persons each to serve as members of a committee which shall undertake

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a study of educational readjustments in the social sciences made necessary or desirable by the war. Professor Edgar Dawson of Hunter College and Professor Frederic A. Ogg of the University of Wisconsin have been named by Professor Henry J. Ford to represent the Political Science Association. The first meeting of the committee, held in the office of the Commissioner of Education February 9, was attended by both appointees, as well as by Professor Ford.

A new publication of interest to political scientists is the *Workmen's Compensation Law Journal*, a monthly containing the current decisions of all courts in the country relating to workmen's compensation, the federal cases appearing first and the state cases following in alphabetical order. A special feature is an alphabetical cross-reference digest-index of the law and the fact. Workmen's compensation statutes are now in operation in thirty-seven states and three territories, and the number of awards and rulings by the various state boards and commissions which are being passed upon by the appellate courts is constantly increasing. The new journal is published at 100 William Street, New York.

On account of their failure to arrive in Philadelphia sufficiently promptly, the accounts of the secretary-treasurer were not audited during the annual meeting. An auditing committee appointed at the business session subsequently went over the books, and has submitted the following report:

We, the undersigned, have examined the report of the treasurer of the American Political Science Association for the year 1917 and the vouchers annexed thereto, and report as follows:

1. We find the amount reported as being on hand at the beginning of the fiscal year to correspond with the amount appearing on the check book.

2. We find the expenditures reported to be supported by proper vouchers.

3. We find no irregularities in the report.

ERNST FREUND,
CHARLES E. MERRIAM,
P. O. RAY,
Auditing Committee.

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Hungarian Franchise Bill. A new Hungarian Franchise Bill was introduced in Parliament shortly before Christmas. The advocates of reform are by no means enchanted with the bill as actually produced; but it admittedly represents a very considerable step forward. It enfranchises all literate men of twenty-four who have ever attended four classes of an elementary school, or paid not less than 10 crowns in direct taxes, or possess a trade license, or are permanently employed in industrial or agricultural work. In the case of men who have been two years in active service during this war, or who possess either the medal for valor or the Charles cross, the vote is granted irrespective of age. Women who have attended four classes of a middle school, or have for two years been members of a scientific or literary society, or whose husbands died in war service, also obtain the vote. There are various provisions for checking the appalling electoral corruption which has hitherto prevailed in Hungary, judicial officials being appointed on all the registration and polling booth committees by way of controlling the more than partial county officials, the candidates being in future forbidden to pay the traveling expenses and food bills of voters, and the sale of liquor being prohibited on the eve and day of elections. On the other hand, the ballot is only to be allowed in sixty-six municipal constituencies; public declaration is to be retained in all the country districts, and, consequently, among the non-Magyars, with the obvious motive of still controlling elections.

It has been calculated that this bill will raise the number of electors from 1,800,000 to 3,150,000 men, and will also add 260,000 women. The Hungarian press openly congratulates the cabinet on having so manipulated the reform as to secure to the Magyars at least 3 per cent more of the votes than they were previously entitled to; and it was announced that a redistribution bill would be introduced such as would make it practically impossible for the non-Magyar races (who on a merely numerical basis are entitled to 198 seats out of 413) to be represented by more than a dozen or so.[1]

The Irish Convention. Since the Act of Union in 1801 there has been a continuous demand on the part of the Irish Nationalists for a repeal of that act and for some form of home rule. But the Irish question did not rise to first-class importance until in 1885 Gladstone declared that if returned to office he was prepared to "deal in a liberal

[1] *The New Statesman*, January 26, 1918.

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spirit" with the demand for home rule. Since then the question has made and unmade cabinets, in quick succession, until it precipitated the recent crisis upon which the outcome of the war itself, so far as England is concerned, may depend.

The events leading to the convention cannot here be traced in detail. We must content ourselves with noting that just before the outbreak of the war an attempt was made by the British cabinet to settle the question by the passage of a Home Rule Act, which, after heated debate and numerous amendments, received the royal assent September 18, 1914. The bill when introduced was not acceptable to Ulster, and was amended by a provision excluding six of the Ulster counties for six years. When the war broke out (August 4), as part of the political truce to which the Unionist party adhered, a Suspensory Act was introduced into the house of commons, September 17, and passed both houses on the following day. This suspended the operation of the Home Rule Act till the end of the war. It settled nothing, and in the meantime the parties in Ireland faced each other for the inevitable struggle that was sure to follow.

On the 23d of April, 1916, an attempt was made by two German submarines to land arms off the west coast of Ireland; a few days later the Easter rebellion was proclaimed. It lasted a week; its leaders were arrested, sixteen were executed, about 3000 arrested and many of them sent to prison. As a result the Sinn Fein party became the most important factor in Irish politics and compelled Mr. Asquith to admit that the "Castle Government had entirely broken down." The Lloyd George War Cabinet proposed that the Home Rule Act be put in operation, excluding the six Ulster counties; and when this was not accepted, arranged for an Irish Convention which should undertake to solve the Irish question.

Formal announcement of the proposed convention was made in the house of commons by the prime minister on May 21, 1917; and three weeks later a statement was made as to the composition of the body. The largest group was to be representatives of the local authorities—the chairmen of the elected councils of the counties and county boroughs, and two delegates from each province to be chosen by the chairmen of the councils of the smaller municipalities. In addition, there were to be six Roman Catholic prelates, a representative of the Protestant Church and the moderator of the Irish Presbyterian Assembly; the chairmen of the Dublin, Belfast and Cork chambers of commerce; five representatives of the trade councils and trades unions in Dublin,

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Cork and Belfast; two Irish representative peers; five persons to be appointed by John Redmond, the same number by Sir John Lonsdale, and two by William O'Brien (the leaders of the Irish parliamentary groups); five by the Unionist Alliance (of southern Ireland); five places to be offered to the Sinn Feiners; and fifteen to be appointed by the British government. The total number would be 101.

Objection was made that the convention was not elected nor proportionally representative. In reply it was urged that a popular election during the war was unwise, if not impracticable; and that all important elements were offered representation. But the Sinn Feiners and Mr. O'Brien's league declined to name their representatives.

The convention met first in Dublin on July 25, with 92 members present, and elected as chairman Sir Horace Plunkett, the well-known head of the Irish department of agriculture and technical instruction. A grand committee began to sit August 15, to consider details of a definite plan. Beginning September 3, the convention met for a time in Belfast; later in Cork, and again in Dublin.

The events leading up to the convention suggest grave political difficulties which must be overcome if it is to succeed; but no one familiar with Irish history can fail to take account of the economic, social and religious problems that will inevitably present themselves. Irishmen have good memories, and they will undoubtedly recall some of the unfortunate chapters of English and Irish history that need not be cited here. They will also be influenced by present social wrongs and economic hardships. The Easter uprising found its most willing recruits from the miserable hovels called tenement houses, from districts where children were starving and men and women were in desperate straits.

The Ulster problem presents both an industrial and a religious aspect. The six counties claiming exclusion are largely industrial; and the Ulstermen feel that their industrial prosperity and their happiness is in part at least due to the union with Great Britain. They also fear discrimination in religious matters; but whatever merits their claims may have, it is difficult to see how the religious question can be solved by separation from the rest of Ireland. In one of the six northeastern counties the Roman Catholics constitute 51 per cent of the population; in none less than 20 per cent; and in all but two, above 25 per cent. On the other hand some of the counties outside the northeastern group have a fair share of Protestants.

Viewed from the standpoint of parties, the problem is even more

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difficult than from the economic or religious standpoint, for concessions and toleration might conceivably overcome these latter obstacles. But the parties in Ireland stand for such irreconcilable ideas that this barrier seems at present almost insurmountable. There are three leading parties. First may be noted the Sinn Feiners. They will be satisfied with nothing less than an independent state, a republic entirely free from the British empire. It is difficult to estimate their actual strength; but it is perhaps safe to say that if the results of the convention are submitted to the Irish voters, the Sinn Fein party will be strong enough to defeat them.

Next are the Nationalists, or Irish Home Rulers. These hold, with the Sinn Feiners, that Ireland is a separate nation, but would be content with a measure of home rule, such as is now possessed by New Zealand or Newfoundland. But while asserting that Ireland is one nation, they claim that Irishmen must retain, under a system of home rule, representation in the imperial Parliament, a right granted to none of the Dominion governments.

Then there are the Irish Unionists, who hold that the welfare of Ireland can be best secured by maintaining the union with Great Britain. They would prefer the union of all Ireland, but are ready to resist, by force of arms if necessary, the separation of at least the six north-eastern counties. But while the Nationalists are strongest in the south and the Unionists in the north, and while this division also runs closely parallel to the religious differences between these two parties, it should be noted that the line of demarcation is by no means distinct, and that no geographical limits can be set as a suitable division of a satisfactory basis for separate imperial relations.

To the cross purposes of parties in Ireland must be added the fact that any agreement that the convention reaches must also be accepted by the parties represented at Westminster. The sentiment in England, judged from reports in the leading English journals, is by no means united. Mr. Dicey, for example, has opposed home rule in any form; the English *Spectator* has insisted upon giving Ulster a separate government if home rule is adopted, and points to West Virginia during the Civil War as a proper precedent; while some of the leading men in every party believe the only solution lies in the Dominion form of government. In a speech in the house of commons, October 23, 1917, Lloyd George, observing that the Sinn Feiners wanted separation or secession, added emphatically, "We had better say at once under no conditions will Great Britain permit anything of that kind."

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The seriousness of the whole problem may be suggested by the government's unwillingness until lately to force conscription on Ireland; nor can much ground for optimism be claimed in the articles of secession drawn up by the Sinn Fein convention, October 29, in the resignation of Sir Edward Carson from the cabinet, in the death of John Redmond, leader of the Nationalists, in the growing strength of the Labor party, in riots and open threats of revolt, nor in the continuous attempts of factions in every party to defeat all efforts at settlement.

None the less, early April brought important developments. In the first place, the government, through a notable speech of Mr. Lloyd George, announced its purpose to seek legislation extending to Ireland the principle of conscription. And in the second place, the plan of government adopted by the Irish convention was officially made public. This plan was carried in the convention by a vote of 44 to 29, most of the Nationalists uniting with the southern Unionists and labor representatives. It provides for a parliament at Dublin for the whole of Ireland, with full powers over domestic legislation, expenditures and direct taxation. The lower house, of 200 members, is to be in the main a popularly elected body, on the analogy of the British house of commons; the upper, known as the senate, is to consist of 64 representatives of commerce, industry, labor, churches, universities, county councils, and the peerage. The Nationalists agree to guarantee to the Unionists 40 per cent of the membership of the house of commons. The question of control of the customs duties is to be left for later settlement.

Minority reports were also presented by the Ulster Unionists and by a group of Nationalists.

The report contemplates that the new system shall go into operation immediately. The assent of the British Parliament is, of course, necessary; and whether it shall be forthcoming will undoubtedly depend to a considerable degree upon the Irish attitude toward conscription. If conscription is seriously resisted, there is little chance that either the government or Parliament will be in a mood to concede any measure of autonomy.

KARL F. GEISER.

Oberlin College.

Absent-voting in Norway. At every election many voters fail to exercise their suffrage rights. It is unquestionably true that most of those who do not vote voluntarily disfranchise themselves through

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lack of interest, but there is no doubt that a considerable number of voters, through no fault of their own, are prevented from casting their ballots on election day. Commercial traveling men, railroad employees, actors, students and others often find it too inconvenient or expensive to vote; physical disability at times makes it impossible.

Until recently, no special consideration was given to the "absent" voter in this country. In the last few years, however, many states have legislated to give the ballot to voters temporarily and unavoidably absent from the polls.

In Norway, a "crowned republic" of Northern Europe, absent voting has been an established institution for over a century. Its experience may, therefore, prove instructive and illuminating. Because of scattered population, difficulty of travel, and a relatively large number of fishermen and seamen, absent-voting developed early in Norway, and has proved popular.

The Norwegian constitution dates from 1814. One of its original paragraphs provided that qualified voters residing within the kingdom, who could not meet at the polls on account of sickness, military service, or for any other valid reason, might send their written votes to the election officers before the polls were closed.[1] In 1896, this paragraph was amended, authorizing parliament to extend the same privilege by law to citizens outside the kingdom.[2] Under the present election laws, all qualified electors in Norway, unable to vote in person, may vote by letter; and though absent from their election district, they may participate in national and in local elections whether they are within the kingdom or outside the kingdom.

Norway elects its parliament for a three-year term on the double election plan—a majority is necessary to elect a member on the first ballot, a plurality elects on the second. Men and women have equal suffrage rights. In the parliamentary election of 1912,[3] 488,913 valid ballots were cast at the first election. Of these, 25,611 or over 5 per cent, were sent in by letter. In the second election, 305,916 ballots were cast, and of these, 19,888, or 6½ per cent, were sent in by letter. 619 votes were received from abroad.[4] The number of absentee voters varied considerably in different parts of the kingdom. In Finmarken,

[1] Norges Grundlov, §60.
[2] Grundlovsbestemmelse af 28 de mai—20 de juni 1896.
[3] *Statistisk Aarbok for Kongeriket Norge*, 1912, pp. 194–195.
[4] *Ibid.*, 1913, table pp. 206–207.

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a sparsely settled county in the far north, 25 per cent of the ballots in the first election and 30 per cent in the second were sent in by letter.

In local elections, fully as large a proportion of votes are cast *in absentia*. In the 1913 city and village elections, 86,239 men and 96,953 women voted in person, and 4338 men and 7765 women voted by letter. In the rural communes, 187,326 men and 91,428 women voted in person, while 10,275 men and 15,599 women voted by letter.[5]

Absent-voting is relatively more prevalent in rural districts than in villages, and more prevalent in villages than in cities. While in all elections throughout the country, absent-voting is more common among women than among men.

The constitution, as already quoted, makes absent-voting permissible where absence from the polls is due to sickness, military service or other valid excuse. The election law of March 29, 1906, governing parliamentary elections, enumerates as valid excuses (a) natural hindrances, sickness, old age, bodily defect, pregnancy, confinement, child nursing or necessary care of children and other helpless persons; (b) military service or other important duty of such a nature as not to permit postponement, or business affairs whose neglect would cause the elector serious loss. Election officers in communal elections are not by law bound to this enumeration, but do use it as a guide in determining the validity of excuses for absent-voting.

In practice, the law is construed liberally, and particularly so in local elections. The election officers are assumed to take into account that it is the duty of the voter to appear in person at the polls if reasonably possible; the ordinary inconvenience, loss or expense attendant on casting the vote in person constitute no valid excuse for absence.[6]

The absent voter is required by law to make out his ballot privately and place it in an envelope which he must seal. He sends this sealed envelope, together with a letter explaining his absence, to the election officers of his district. If he is sick or otherwise incapacitated from making out the ballot himself, he may have it done for him, but in his presence. No proof is required for the statements made other than the solemn affirmation of the voter, but his signature must be witnessed by some reliable person over twenty-one years of age. Ordinarily, however, a physician will certify as to the sickness of a voter, and other reliable persons, not necessarily of full legal age, may confirm other statements made.

[5] See table p. 8 of *Norges Officielle Statistik*, VI, 12, Kommunevalgene, 1913.
[6] Alfred Ihlen, *Oversigt over Lovreglerne om Kommunevalgene*, pp. 62–63.

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Those voting within the kingdom must vote for candidates in the same manner as those voting at the polls. Fishermen, immediately outside the territorial waters, are regarded as within the kingdom.[7]

Absentee voters outside the kingdom (including fishermen off Iceland, the Faroe and the Shetland Islands) are privileged to cast their votes for their party without designating any candidate's name, for they may not have had the opportunity to learn who the candidates are.[8] Voters outside the kingdom must have their signature witnessed by a Norwegian consul or a Norwegian ship's captain. A voter may cast his ballot before leaving for a foreign destination if he so chooses.

In parliamentary elections, voters may not send in ballots more than three months before election.[9] Those voting abroad may not vote before March 1, preceding the fall election.[10] The date of the explanatory letter accompanying the ballot determines the date of the ballot.

A person, after sending in his ballot, may change his vote at any time provided his new ballot reaches the election officers before the polls are closed. If a person changes his plans and is present in the election district on election day, his vote by letter is not counted.

When the polls are closed, the election officers first decide on the validity of the excuses offered by the absent voter. The procedure is public and opportunity is given to disprove or to confirm the statements made. If the election officers decide against a person's right to vote, his ballot is not removed from its sealed envelope, but is preserved, together with its letter of transmittal. If the excuse is accepted as valid, the ballot is placed in a regulation voter's envelope, and deposited in the ballot box. In parliamentary elections, a separate ballot box is used for these votes that come in by letter.[11] In the communal elections of 1913, 13.5 per cent of the male absent voters and 15.6 per cent of the female absent voters in the rural districts had their excuses rejected as insufficient; in the urban districts, 11.6 per cent and 9 per cent, respectively, were rejected.[12]

Absent-voting has proved a success in Norway. Its homogeneous population has been predominantly rural, and relatively stationary. The voters of a district generally know each other and are known by the

[7] See Bredo Morgenstjerne, *Lærebog i den norske Statsforfatningsret*, p. 229.
[8] *Ibid.*, pp. 229–230.
[9] Election Law of March 29, 1906, §23.
[10] Law of June 2, 1906, §1.
[11] Law of Feb. 27, 1912.
[12] *Norges Officielle Statistik*, VI, 12, Kommunevalgene, 1913, p. 9.

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election officers, who are, as a rule, men of standing in the community. There may be a tendency toward a too liberal extension of absent-voting privileges in some of the rural districts, but there is little likelihood of fraud. In cities, absent-voting is not used so extensively, and the election officers scrutinize the excuses for absences very carefully.

Other factors that help simplify the operation of absent-voting in Norway are the prevalence of the short ballot in national elections, and the absence of direct primaries, initiative, referendum and recall. Our American states have a far more complicated problem to solve, but its solution is neither impossible nor less desirable.

R. S. Saby.

Cornell University.

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NOTES ON INTERNATIONAL AFFAIRS

EDITED BY CHARLES G. FENWICK

Bryn Mawr College

Codification of International Law. The breakdown of international relations exhibited in the present war has brought home to us the contradictory character of many of the elements of existing international law. It has been the custom to apply the term "international law" pretty freely to a wide range of international practices upon which it cannot fairly be said that there is or was any general agreement of the nations. Taking international law in the strictly positive sense of a body of rules actually accepted by the nations and evidenced by their formal statements and consistent usage, we find a variety of conflicting opinions as to the validity of particular rules. Certain fundamental principles are perhaps fairly clear, especially when contemplated as theoretical rules. We can say that in the abstract nations have a right of self-preservation, a right of sovereignty and independence, a right of legal equality, and a right of security in their territorial possessions. We can say that states are responsible for the acts of their agents, that their ambassadors have certain privileges in the countries to which they are sent, that their treaties must in general be faithfully observed. But when we get beyond fundamental principles we are met with opposing schools of international law, with positivists as opposed to Grotians and these in turn opposed to naturalists, with a Continental doctrine as opposed to an Anglo-American doctrine, with conflicting rules as to acquisition of citizenship, as to the right of expatriation, as to national responsibility for acts of mob violence, etc., to say nothing of the arbitrary practice of intervention, or of the hitherto irreconcilable views of the great powers in regard to the rights of belligerents and neutrals.

Clearly, therefore, if international law is to be codified, the method to be followed cannot be that adopted in the codification of national law. In the case of our several states which have undertaken to reduce their law to a code there have been fairly definite sources of law upon which to draw. There is the binding tradition of the courts which can

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be traced in case after case presenting more or less similar issues and similar circumstances, and though no two cases may present precisely the same facts the very volume of them makes it possible to extract a sufficiently clear rule. There are the positive enactments of statutory law taking precedence over the tradition of the courts, though themselves requiring interpretation by the courts. While omissions in the law may be found, and on some minor points there may be no rule which can be regarded as authoritative, yet on the whole, when the work of codification is complete, there appears a comprehensive system embodying the substance of existing law, better classified and more clearly presented. The demand for codification was based not upon the need of a fundamentally new system, but upon the desirability of making the body of rules already in existence more readily accessible, with minor changes to bring them more in touch with the times.

In the case of international law the process of codification must be something more than a systematizing of existing rules. For these rules have developed in a more or less haphazard fashion and cannot be said to have been logically framed to meet the needs of the international community. Starting from the unsound foundation that nations were sovereign and independent units in a world possessing no common bond of law, the rules of international practice have grown and expanded in a futile effort to adjust an originally bad system to the new demands of international intercourse. And unfortunately in this process of growth and expansion there has been no international legislative body capable of sweeping away outworn traditions and replacing the obsolete customary rule by a new statutory one of immediate obligation. Custom has been the chief source of international law, and as such it has been attended by very obvious limitations. In the first place it is an uncertain law, in that it is difficult to determine the number of reiterated acts which constitute general or regular observance; and in addition there have been too few cases presenting substantially the same facts to make it possible to extract a common rule from them, unless it be one of the most general character. Moreover, custom has been of too slow growth to keep pace with the changing relations of the states which it endeavors to regulate, and in consequence international law has lagged far behind the newer phases of international relations brought about by the social and commercial intercourse of modern times. Further, custom is unable to reorganize a system which is defective as a whole, and cannot so much as map out progressive lines of reform for the future.

As a supplementary aid to custom the nations have fallen back upon

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treaties, by which they have pledged themselves to the observance of certain rules. But treaties, though they bear some analogy to the statutes of national law, have been too limited in their authority to be of any great value in directing the codification of international law. In so far as they have been concluded between the nations two by two they have, of course, no binding force except upon the contracting parties; and in so far as they have been concluded between the nations as a body, as was the case with the conventions of the first and second Hague Conferences, they have been attended by reservations and qualifications which make their statutory authority exceedingly vague. The conventions adopted at the Hague Conferences are undoubtedly a step forward in the task of codifying international law, for with all their limitations they represent an attempt on the part of the nations to define the common practices of the past, with the addition of many new rules of a progressive character. Unfortunately the conventions relate chiefly to the conduct of war, and even had they stood the test of the present armed conflict they would have done but little to mitigate the horrors of a procedure inherently barbarous.

What the world needs is a new statement of the rights and duties of nations in their normal pacific relations. Hitherto the machinery of international arbitration has occupied the attention of publicists to the exclusion in many cases of the development of the substantive law. It has not always been recognized that the chief obstacle in the way of arbitration has been not so much the lack of an impartial court to which the dispute could be submitted as the lack of definite principles of law to be applied by the court. In consequence, even where the nations have expressed a general willingness to arbitrate, they have introduced into their treaties an exception of the very questions upon which the issues of war and peace depended. There is no logical foundation for the exclusion from international arbitration of questions involving honor and vital interests, for such questions between individuals are daily adjudicated by national courts. The distinction between justiciable and nonjusticiable disputes is nothing more than a recognition that upon certain subjects the rules of international law are not clear, and that for lack of a clear rule of decision the particular subject cannot be entrusted to a judicial tribunal.

The new and authoritative code of international rights and duties must be the creation of international statutory law. It must recognize the authority of past practice only in so far as such practice conforms to the new principles upon which international relations must be based.

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These principles will be the expression of the common bond of moral ideals and material interests which has long existed in fact between the civilized peoples of the world, but which has failed to receive adequate recognition by governments because of the outworn traditions by which their diplomacy has been guided and because of the failure of the general public to realize that international good will, to be effective against the occasional wrongdoer, must take the form of institutions organized to bring the forces of the community to bear upon those who would override the law. The war has sharpened the sense of international unity by bringing out into clear perspective the malevolent character of the forces opposed to it. To cement the unity of the nations a new constitutional law is needed which only an international legislature can enact.

A League of Nations and International Law. One of the most hopeful tendencies in current discussion of the "great settlement" is the increasing emphasis upon the underlying causes of international disorder rather than upon its superficial manifestations. Another factor in the present situation that is heartening to democrats everywhere is the possibility of organizing some kind of a concert of nations out of the existing chaos. Such a concert ought to give real significance to a settlement whose terms are conceived in a new and chastened spirit. There are encouraging indications that some kind of rudimentary supernational authority will be constituted, and that, so far from being "a wondrous entity fashioned out of preceding nothingness," it will be founded upon realities and in intimate contact with the fundamental causes of international friction. All this gives promise of a better future for the society of nations. Furthermore, it is widely appreciated that the permanence of a league of nations must rest upon the reign of law and that in important respects the existing body of international law is quite inadequate. It does not seem to be appreciated, however, that the entire theory of international law must undergo drastic revision, and that there is a practical relation between an early revision of theory and the permanent success of a league of nations.

The Theory of International Law. The unreality of the modern law of nations is more a matter of theory than of substance. While jurists of all countries have shown an increasing disposition to derive substantive rules from positive sources, they have never ceased trying to reconcile substantive rules with a theory which, in most of its essential ideas, still rests upon the leading principles of the naturalists of the seventeenth

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and eighteenth centuries. How unreal, for example, is our conception of the state as an international person. International personality being admitted, theory denies any difference between an inland state and a maritime state, between a state of 400,000,000 inhabitants and one of 400,000, between a petty kingdom perched on a mountain top and an empire whose flag floats over one quarter of the earth, between a state having a thoroughly liberal constitution and another whose constitution may be a constant menace to peace. It would seem that theory is not far advanced in this respect from the simple proposition of Hobbes and Pufendorf that *civitates semel institutae induunt proprietates hominum personales.*

Similarly, our theory of the relation between nations is little more than a modern version of the theory of the naturalists that international society is a state of nature, in which there is a perfect equality of natural rights, and in which the ordinary legal remedy is self-help in the form of threats and display of force, reprisals, rupture of diplomatic relations and war. While we have abandoned the idea that international law is simply the law of nature applied to independent states in a state of nature, our law of nations is still in theory *inter* instead of *supra*, independence is theoretically unlimited, and it is an open question whether the so-called law between nations is really law in any true sense or is simply a body of pious *voeux*.

Finally, the theory of modern international law denies the existence and even the possibility of supernational institutions. Every tendency toward international organization has been denounced as *un fait politique* in sharp contrast with what might be called *un fait juridique*. For how, queries the publicist, can you have supernational institutions when sovereignty is unlimited, when states are naturally equal, and when law is between states and not above them?

These are some of the most obvious defects in a theory that is quite out of contact with important tendencies in international relations. Some of its practical consequences may be suggested. Thus the tendency of the books to emphasize rights while neglecting remedies is largely the consequence of an unsound theory. Here, too, is a partial explanation for that anomalous body of precepts called the laws of civilized warfare. The same theory is responsible for the classification adopted in most of the books, a classification which has nothing to commend it except the circumstance that for more than a century it has passed "like gaping from mouth to mouth."

On the other hand, the theory of international law has prevented the

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recognition of elemental principles of classification which must be admitted if the league of nations is to have permanence. The law of nations recognizes no difference, for example, between rules applicable to the relations between international persons and rules of organization. The point may be clarified by taking an illustration from national experience. Within nations private law is distinguished from public law, and constitutional and administrative law are included in the latter category. Many legal principles are limited in their application to private law, i.e., to rules applicable to the relations between persons and to the acquiring of rights and the assuming of obligations under such rules. They may be inapplicable from their very nature to rules of organization. The law of nations as expounded in the books recognizes no such distinction. The reason for this is found in the persistent refusal of the publicists, with a few illustrious exceptions, to recognize the existence of rudimentary supernational institutions. Rules applicable only to the relations between states have been applied indiscriminately to the problem of international organization, and the whole movement toward supernational authority has been confused and retarded.

The success of a concert of nations will be compromised at the outset if publicists and diplomats set about the work of reconstruction in the spirit of those high priests who sought to replace stone and pillar of the temple upon which profane hands had recently been laid. There was a good deal of unstable stuff in the temple of international justice, and much of it has been destroyed beyond repair. There is hardly a text or treatise that should not be obsolete the day peace is proclaimed, not because the substance of the books is valueless, but because the substantive rules have been fitted into a theoretical scheme of things that is as unreal as it is impractical. If a league of nations secures general recognition the theory of international law will be revolutionized. It must be revolutionized if the concert of nations is to be a permanent success.

It is suggested that as an essential preliminary to this readjustment the theory of international law should be tested in its relation to the realities of international relationships; and that the test may be applied conveniently from three different points of view, which may be stated in the form of three questions: (1) How far does theory accord with the facts of international relations? (2) How far do those facts with which theory agrees constitute elements that should be conserved, and to what extent should they be eliminated in the interest of a better international order? (3) How far does theory, wherever it is not in accord

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with the facts, offer a rational ideal for future development? The application of these or similar criteria should result in a useful revaluation of nineteenth century notions of personality, society, law, and organization in the theory of international law. It should suggest, among other things, the importance of taking into account the constituent elements prerequisite to state existence, of placing less emphasis upon independence and more upon interdependence, of regarding the law of nations as supernational rather than international, and of recognizing the evolution of supernational authority as a logical and desirable development in the society of nations.

The "Equality of Nations." There are few principles of international law that are likely to cause as much difficulty in the actual constitution of a league of nations as the postulate of absolute equality among sovereign and independent states. "Relative magnitude creates no distinction of right," says Sir William Scott, "relative imbecility, whether permanent or casual, gives no additional right to the more powerful neighbor; and any advantage seized upon that ground is mere usurpation."[1] According to Chief Justice Marshall: "No principle of general law is more universally acknowledged, than the perfect equality of nations. Russia and Geneva have equal rights. It results from this equality, that no one can rightfully impose a rule on another. Each legislates for itself, but its legislation can operate on itself alone."[2] In these famous dicta the learned justices were simply repeating what had been taken as axiomatic by a majority of the publicists since the days of Pufendorf and the founding of the naturalist school. The "equality of nations" in international law was a creation of the publicists. It was derived from the application to nations of theories of natural law, the state of nature, and natural equality. An analogy was drawn between nations in international society and men in a state of nature. Thus the natural law became the law of nations, international society was regarded as a state of nature, and nations were presumed to enjoy a perfect equality of natural rights. Once established by this process of reasoning the principle was reënforced by theories of sovereignty. The absolute equality of sovereign states became a postulate of *le droit des gens théorique.*

The maxim has an important legal significance in the theory of modern international law. It is the expression of two important legal

[1] *Le Louis*, 2 Dodson 210, 243.
[2] *The Antelope*, 10 Wheaton 66, 122.

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principles with reference to which there is an extraordinary confusion of thought and of statement in the books. The first principle may be described as equal protection of the law or as equality before the law. Nations are equal before the law when all are equally protected in the enjoyment of their rights and equally compelled to fulfill their obligations. Equality before the law is not inconsistent with grouping nations into classes, and attributing to the members of each class a status which is the measure of their capacity for rights. Neither is it inconsistent with inequalities of representation, voting power, and contribution in an international concert. The second principle is usually described as equality of rights and obligations, or more often simply as an equality of rights. The description comes down to us from theories of natural law and natural right. What is really meant is an equality of capacity for rights. In this sense equality is the negation of status. If applied without qualification to the organization of an international concert it would require equal representation, contribution, voting power, etc. Equality before the law is absolutely essential to a stable society of nations. If it is denied, the alternatives are universal empire or universal anarchy. Equality of capacity for rights, on the other hand, is not essential to the rule of law. Strictly speaking, it has never been anything more than an ideal in any system of law. Among nations, where there is such an utter lack of homogeneity in the physical bases for separate national existence, there are important limitations on its utility even as an ideal.

Equality among nations is frequently explained and justified by drawing an analogy with the situation of human beings under municipal law. Perhaps there is a lesson in national experience. It is generally assumed that equality of legal capacity among persons subject to law is the ideal toward which a system of private law ought to develop; but it has never been regarded as a necessary consequence that the same principle should be taken for an ideal in perfecting national organization, much less that it should be given practical application in the form of equal participation in government. No civilized government has ever tried to combine universal suffrage, the folk-moot, and the liberum veto. It may be suggested parenthetically that the organization of human beings on such a basis would be less unreal and would give greater promise of success than the organization of nations on the same principle. The problem of supernational organization ought never to have been confused and complicated by the "equality of nations." Even granting that equality of capacity for rights is sound as a legal principle, its

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proper application is limited to rules of conduct and to the acquiring of rights and the assuming of obligations under those rules. The principle is inapplicable from its very nature to rules of organization. Insistence upon perfect equality in the constitution of a union, tribunal, or concert of nations is simply another way of denying the possibility of supernational government.

It is significant that almost every writer who has seen the possibility of rudimentary supernational institutions has doubted or denied the dogma of equality. It is more significant that wherever anything of the nature of a rudimentary supernational institution has made its appearance in the actualities of international relations the principle of equality has been compromised. The evolution of primitive supernational government is of great importance because it undoubtedly furnishes our safest guide in promoting the further development of a concert or league of nations. It suggests facts which may be relied upon to support a concert that is constructed on principles grounded in experience, as well as pitfalls that are certain to be encountered if the lessons of experience are disregarded.

At least as early as the nineteenth century, nations began to emerge from the state of nature and to lay crude foundations for organization. The concerted action of the great powers, launched during the Napoleonic wars, became a very primitive and unstable supernational legislature, executive, and court of appeal combined. Throughout the various vicissitudes of its development this concert has solved the problem of equality by excluding the secondary powers from its conferences. Admitted only when their own affairs were in question, in a consultative capacity, to present evidence and withdraw, or not at all, the nations of the second rank have never enjoyed equality with the great powers in the government of Europe. The books generally explain this circumstance as being *un fait politique* as distinguished from *un fait juridique*.

There has appeared a significant tendency to qualify the perfect "equality of nations" in the development of supernational administrative unions. In several of the most important unions equality has been compromised by admitting representatives of colonies, thus according to the colonial nations several times as much representation as that accorded to others. The principle of majority decision in voting has received some recognition. In several cases voting power has been divided among the nations represented in the same proportion in which they share in the financial support of the union, thus recognizing a

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thoroughly sound principle, namely, that equality of influence implies equality of responsibility. Two attempts were made at the beginning of the twentieth century to constitute true supernational courts, one the so-called international court of prize for which provision was made by the second Hague Peace Conference, and the other the court of arbitral justice, wrecked at the same conference on the question of the court's composition. It was found impossible in each instance to constitute any kind of a permanent court on the basis of equality. The principle of equal representation for the eight great powers and rotation for the lesser powers was adopted for the prize court and widely advocated for the court of arbitral justice. The impossibility of admitting the "equality of nations" in constituting a court of arbitral justice was admitted in all responsible quarters, and was taken by the most conspicuous spokesman of the small states as an excellent reason for not constituting the court at all.

If the "equality of nations" is inapplicable on principle and precedent to the organization of supernational institutions, upon what other basis or bases may they be constituted? It is submitted that the fundamental basis for such a league should be the representation of population. The purpose of all government, national or supernational, is to promote the mutual welfare of human beings. In so far as it can be done consistently with the creation of practical agencies through which such a league must function, and with due regard to certain limitations on population as a basis for representation to be mentioned presently, the future concert of nations should be made as representative as possible of the human beings who inhabit the earth. Organization on this basis would be relatively simple if all people were equally civilized, but unfortunately they are not. The quantitative principle of population must be supplemented by certain qualitative tests designed to measure the degree of civilization attained by the people of each nation. This is a difficult thing to measure. It can probably be done most satisfactorily by taking account of wealth and of force, not merely potential in either case, but wealth and force which could be mobilized within a limited period if necessary.

The practicability of population and civilization as bases for the organization of a league is indicated by the fact that the concerted action of the great powers has been based in a crude way on just these factors. The defects in a concert that is restricted to the great powers can be avoided and lesser powers induced to participate on a proportional basis if the responsibilities of the concert are large, and if participation

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is apportioned in the same way as responsibilities. If sharing in the concert's decisions can be made to carry with it large responsibilities, the capacity to assume these responsibilities may be made an adequate measure of the combined elements of population and civilization. Such a measure ought eventually to become almost automatic in its operation, and its application to particular nations ought to become a matter of voluntary decision on the part of each. Too much emphasis cannot be placed upon the importance of having large responsibilities to apportion. Otherwise nations will not be willing to forego their claim to equal representation and voting strength, it will be impossible to develop any loyalty to the supernational authority, and its usefulness will probably be short-lived. The matter is one of great difficulty, but the present opportunity is extraordinarily favorable. The rehabilitation of Belgium, Serbia, and Poland, the restoration of devastated areas, police of the seas, police of the Balkans, administration of contested backward areas such as Morocco, China, Turkey, and Albania, administration of important trade routes such as the straits at Constantinople and the Bagdad Railway, the assumption of war debts—all suggest possibilities.

To summarize: (1) representation in a league of nations should bear some approximate relation to population; (2) more civilized peoples should have proportionately greater representation; (3) capacity to assume responsibilities in support of and as the representative of supernational authority is a practicable measure of population and civilization.

Whatever the basis for the future league may be, the "equality of nations" will become an obsolete principle as soon as the league secures general recognition. A supernational authority, whatever it may be called, will destroy the whole foundation for the notion of equality. International society will have ceased to be a state of nature; self-help will no longer be the usual remedy; separate nations will have yielded their supremacy; the law of nations will have become *supra* instead of *inter;* instead of being an end in itself the nation will have become a part of that larger organization whose function it is to promote the well-being of humanity. It is reasonable to hope that nations can be induced to accept a new order founded on these principles if it can be made clear that such an order offers compensations for abandoning the old anarchy, provides means for securing that equality before the law which has ever been an uncertain possession among nations, and apportions influence in proportion to capacity and willingness to assume responsibilities.

E. D. Dickinson.

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BOOK REVIEWS

EDITED BY W. B. MUNRO

Harvard University

Science of Legal Method: Select Essays by Various Authors. Translations by Ernest Bruncken and Layton B. Register. Introductions by Henry N. Sheldon and John W. Salmond. Editorial prefaces by John H. Wigmore and Albert Kocourek. Modern Legal Philosophy Series, Vol. IX. (Boston: Boston Book Company. 1917. Pp. lxxxvi, 593.)

"Do not talk to us of the meaning of the Statute;" said Hengham to Malmesthorpe at a hearing in the Michaelmas term of the thirty-third year of the reign of Edward the First. "We understand the Statute better than you, for we made it."

The theory of the separation of the executive, legislative and judicial powers has so firm a hold upon Anglo-American methods of legal thinking that Hengham's easy method of arriving at the intention of the legislator seems to belong to a period that has gone forever. Mr. Justice Holmes may invoke this principle to show that the court is justified in finding that a mandate, which, issued within the personal recollection of its members, ordered the lower court to do just what that court actually did; but as a means of construing the acts of the legislature, we feel that it is as obsolete as the real actions. The belated survivor of this intimate union between the judicial and legislative departments perished three-fourths of a century ago when a member of the New York senate, acting as judge of the court of last resort, relied upon his personal knowledge of what took place in the legislature to aid him in determining whether a statute which created a joint stock association was intended to create a body corporate or not.

But progress in law, as in everything else, is likely to be in a series of ascending spirals rather than in a straight line; and as we read this volume, we find that modern juristic thought is ready to deny the wisdom or even the possibility of a separation of legislative and judicial powers, and is ready to claim that the Plantagenet method of constru-

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ing a statute possesses advantages which are lacking under our neat fiction that the legislative power and the judicial power are the two hands of our body politic, neither of which knows what the other is doing until the ultimate product is displayed to the world. We see that even before the great war the profound feeling of dissatisfaction with existing social institutions in general and, from our viewpoint, with the laws in particular, had influenced the men who had made a special study of juristic science, and who appreciated both the wonderful accomplishments of the law and the defects in its development and in its administration far more intelligently than those who assumed the benefits of law as a part of the order of the universe, and who criticized the actual results with but the slightest notion of the means by which different and desired results might be obtained.

The expressions of opinion which are collected in this volume agree upon a common dissatisfaction with existing conditions. The jurists of the continent of Europe, the land of codification, rebel against the rigidity of the codes, and demand that greater liberty of judicial action which its prophets term "free judicial decision;" while the Anglo-American jurists, from the land of judicial precedent and of legislation which, until recent years, has been scanty and haphazard, rebel against the iron chains with which their courts have in part fettered themselves and with which in part they have been fettered in response to the actual demands of popular government. The movement is not bounded by national lines. From France, Gény, from Austria, Ehrlich, and from Germany, Gmelin, join in the same demand that Pound makes for Anglo-American law—a demand for such freedom of judicial action as to make law primarily a means of administering justice and not a set of rigid rules to be applied mechanically without regard to the quality of the ultimate product.

The feature of the existing law which causes the most dissatisfaction is likely in each country to be that feature which is most characteristic of its law in its present condition. In the United States the rigid character of the codes of civil procedure and of the rules of common law, the growing rigidity of the rules of equity, and the haphazard character of legislation in general is felt to be the cause of that feeling of dissatisfaction which on the continent of Europe bursts forth against every idea of a rigid, complete and all-embracing code.

As might be expected, there is some discord as to the means of reaching this desired end. While Ehrlich looks on England as the classical country of free legal decision, which is unable for that very reason

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to understand what the law of nature meant; Berolzheimer regards England's freedom of judicial decision as a constant appeal to the law of nature; and in opposition to the fundamental assumption of both of these authors, Gerland and Lambert insist that Anglo-American law has gone much farther than continental law, both in isolating law from the social environment in which it was cradled, and in setting forth more frankly and more crudely the fiction that the judges have no part in creating law. Either they look at Anglo-American law with different eyes, or freedom of judicial decision means different things to the different writers.

Whether, as Alvarez and Freund, they emphasize the need of a rational and intelligent legislation which shall serve as a basis and stimulus for a fresh juristic start and not as a means of mummifying the law, of paralyzing thought, and of substituting obedience for growth; or as Wurzel, they show what we are really doing when we engage in what is called juridical thinking; or as Pound and Ehrlich, they insist on greater freedom of the court in applying legal principles; in the main they agree as to the general path which the evolution of the law must follow. We must cease to believe that it is possible for either legislator or court to frame a set of immutable rules which will govern all future cases as they arise. We must realize that law can live only if it adapts itself constantly to social forms which are in a constant state of renewal; and that, since we are living in history, the incessant bending of the law to fit the facts of life, which is assumed in all historical study of the law, did not end with feudal tenures or with common law actions; and that it must therefore be no longer ignored in modern legal study. We must realize that while it is possible to set up a series of legal concepts and to deduce exact results from them by verbal logic, the results thus obtained will bear no relation to life, or to a law that fits life, as all law that is alive must fit it. We must give up our artificial separation of the legislative power from the judicial power—a separation which never was true in fact; and we must seek rather a reincarnation on a higher plane, of the Roman praetor whose edicts were legislative and who administered the law which he had made. The work which has been done subconsciously, by pushing difficulties out of the law and by passing them on to the facts; by the assumed existence of a complete, perfect and unchangeable body of law which is known only to the judge; and by the use of "India rubber rules," which stretch or shrink as desired, or of "safety-valve concepts" which open when explosion impends—this must be done frankly, consciously, intelligently, so as to adapt the means of law to the end of producing a just result.

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It might be an invidious comparison to say that this is the best volume of the series. It is certainly the most stimulating and helpful one. While the other volumes show us the past trend of legal thought or the present place of the law, this unbars the door of the future. We may not agree with all the conclusions of the authors. For that matter, they do not agree among themselves. We may feel that a closer study of what is known of the formation of primitive custom would narrow the gap between primitive custom and law made by judicial decision; that a study of judicial decisions in America, where the mass is so great that no individual now dominates, would show that the weight given to the opinion of certain individual English judges was an accident of a time when judges were few and great judges preëminent, and not a characteristic of Anglo-American law; and as for the praetor, is he not here today in the great administrative commissions, branches of the executive, who make rules which have the force of statute law, and who then administer them.

This volume, like several others of the same series, is a collection of essays, of monographs, and of excerpts from the larger works of several different writers. Contributions have been levied upon Gény's *Methode d'interpretation et sources en droit privé positif;* Ehrlich's *Freie Rechtsfindung und freie Rechtswissenschaft;* Gmelin's *Quousque;* Kiss's address delivered before the Congress of the International Society of Legal Philosophy in May, 1910; Berolzheimer's *Gefahren einer Gefühlsjurisprudenz in der Gegenwart;* Kohler's *Lehrbuch des Bürgerlichen Rechts;* Roscoe Pound's *Courts and Legislation;* Gerland's address delivered before the Society of Juristic Medicine; Lambert's *La Fonction du droit civil comparé;* Wurzel's *Das Juristische Denken;* Alvarez' *Une nouvelle conception des études juridiques et de la codification du droit civil;* Gény's contribution to *Le Code Civil, 1804–1904, livre du centenaire;* and Freund's work on *Standards of American Legislation.* It has the merits of its necessary defects. It gives us, in broad survey, a comparison of the views of a number of writers and thinkers upon the same topic and at the same time it gives us but fragments of each writer's thought and a detailed study of the views of none. It is to be regretted that it did not prove practicable to give Ehrlich's views in their later form, as set forth in his *Grundlegung der Soziologie des Rechts;* but no one would be rash enough to think of discarding anything from the selection that has actually been made. It needs all these different viewpoints to enable us to grasp the great problem that they present to us. The volume is like Giovanni's wheel, made up of a multitude of men; from

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whose lips issue scrolls of all different colors except white; and all of different meanings but each ending "Such is Truth." As the wheel revolves, the objects and colors blend; and then it appears as stationary and white, the color of truth. As the different views of these writers move before us, we see indeed that "Such is the Law."

WILLIAM HERBERT PAGE.

University of Wisconsin.

The Monarchy in Politics. By JAMES ANSON FARRER. (New York: Dodd, Mead and Company. 1917. Pp. ix, 342.)

Abundant and painstaking care has been bestowed on *The Monarchy in Politics*, and with only a little extension of the plan Mr. Farrer's book might have filled a gap in the constitutional history of Great Britain that has long existed, and has long been obvious. As it is the book lacks an adequate setting; and while it is a thoroughly acceptable and serviceable addition to the literature of English constitutional history, and particularly to the literature that is concerned with the evolution of the cabinet, it does not quite fulfill its title. Mr. Farrer's aim has been to trace the influence that the monarchy had on the policies of cabinets from the reign of George III to the reign of Victoria; and also to show, as he does with much interesting and informing detail, how tardily and reluctantly George III, George IV, William IV and Victoria accepted the doctrine of parliamentary government, and of the responsibility of the cabinet to the house of commons, and through the house of commons to the electorate. George III, as far as he could, repudiated this doctrine; and his successors accepted it only when it was forced upon them, and they realized that there was no alternative and no appeal.

But the phrase, "the monarchy in politics," implies much more than this; for domestic political questions have their origin in the constituencies; they are finally determined in the house of commons; and to influence or control politics with any effect or certainty the monarchy must be active in electioneering. It was active in the elections until the end of the reign of William IV. George III was the most active, the most venturesome, and, from his point of view, the most successful of the many English kings who engaged in what the Countess of Bessborough once described as "electioneering jockeying." In this country George III would be described as a party boss; and there has never been a boss in the municipal, state or federal politics of the United States who could

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not have learned much in boss tactics from George III. Every English sovereign from at least as early as Henry VIII to William IV interfered in elections. Bossing by the crown, however, reached its zenith in the first twenty-five years of the reign of George III. It tapered off sharply in the reigns of George IV and William IV, and entirely disappeared after the accession of Queen Victoria, who never seems to have made the least attempt to interfere in a parliamentary election.

From the point of view of the present day conception of the constitutional position of the monarchy, the greatly lessened activity of George IV and William IV in electioneering, and the complete abandonment of all active interest in electioneering by Queen Victoria, were a great gain, which helped to mark the beginning of a new epoch in the constitutional history of England. But in Mr. Farrer's book no systematic attention is given to the activities of the crown in electioneering, and little or no notice is taken of the cessation of these activities. To this extent Mr. Farrer's book does not fulfill its title. It has been indicated that it lacks an adequate setting. It begins abruptly in the early years of the reign of George III, without the least reference to anything in English history that had happened before George III came to the throne. There is no preface and no introductory chapter. These are singular lacks in a book of this character.

To make the book fill the existing gap in the constitutional history of England—even to make it of wide service to ordinary students of constitutional history—there are needed (1) a sketch of the condition of the house of commons in the first thirty years of the reign of George III; (2) some statement of the great change in the position of the sovereign that resulted from the struggle with the Stuarts and the revolution of 1688; and (3) a sketch of the beginning of the modern cabinet, and at least a brief statement of the place at which the evolution of the cabinet had arrived when George III came to the throne, and, abandoning the attitude of his grandfather, George II, towards the cabinet, determined to make himself boss of Parliament—of the house of lords as well as of the house of commons—and by so doing established himself for a time as his own prime minister.

The evolution of the cabinet has been an exceedingly slow process. The history of its evolution from the reign of William III to the beginning of the great war, or to the end of Victoria's reign, is really the story of how the cabinet, responsible to the house of commons, and dependent from day to day on a majority in that house, slowly and toilsomely drew to itself powers that were once the prerogative of the crown. This

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process had been going on steadily from the reign of William III to the end of the reign of George II. It was checked, and, moreover, some ground that had been gained was lost in the reign of George III; and progress towards the cabinet as it now exists was not resumed until April, 1835, when William IV was compelled to recall Melbourne and the Whigs, whom he had dismissed in November, 1834. Melbourne, as Mr. Farrer brings out with admirable clearness, was then in a position to insist on terms. These were: (1) that no more members of the royal household whose opinions were hostile to the government should be selected from either the house of commons or the house of lords; (2) that there should be a creation of peers to counterbalance additions made to the house of lords by Peel; and (3) that William IV should give his preliminary consent to the Irish tithes bill—agree to give his assent to it after it was passed, and also his support to its progress through Parliament. Mr. Farrer entitles the chapter describing the establishment of this landmark of 1835 in the history of the evolution of the cabinet "William the Conquered," and in his narrative of the episode he writes "the minister prevailed, and the king was conquered." But there were many struggles yet to come with Queen Victoria; and in these struggles the queen displayed, for a time at any rate, nearly as much obstinacy and toryism as regards the crown and its prerogatives as had been displayed by George III.

From the point of view of steady and continuous progress in the evolution of the cabinet, the queen, in the early years of her reign, fell into the hands of unfortunate tutors. Stockmar, King Leopold of Belgium, and the Prince Consort were intent on exalting the crown, and diminishing the importance of the cabinet and the house of commons. The queen, moreover, was always an apt and willing pupil when tutors were instilling into her the importance of parting with none of the powers that the crown had exercised by virtue of the prerogative. Struggles developed at one time in connection with domestic legislation; at another with the control of the army; and at others with the civil service. Most of the struggles, however, developed out of foreign policy; for the queen was intensely German in her sympathies and antagonistic to any policy which might tend to thwart the ambitions of Prussia or diminish the importance of Austria. These numerous conflicts are traced in detail by Mr. Farrer, who in treating of the four reigns—George III, George IV, William IV and Victoria—has drawn with fullness and success on the letters and memoirs of nearly every statesman of these one hundred and forty years.

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By far the largest part of the book is devoted to the reign of Victoria. The reasons for this are obvious. Many questions in which the monarch and cabinets differed came to the front in the reign of the queen; and with the continuous movement in Great Britain towards democracy, ministers became more insistent that power must rest with the cabinet, because the transfer of power from the crown to the cabinet was in accord with their conception of government by Parliament, and because they realized that the constituencies would support them in this position. Another obvious reason for the detail that characterizes the treatment of this reign is the existence in print of the queen's letters of the period from 1837 to 1861, and the ample proportions of the published letters and memoirs of nearly all the statesmen of the Victorian era.

Excellent use has been made of all this material by Mr. Farrer, and of similar material of the reigns of George III, George IV and William IV. Mr. Farrer has drawn singularly little on the writings of the constitutional historians. He makes no mention, either in the text or in the bibliography, of the noteworthy series of articles on the crown and the cabinet that Dunckley, under the nom de plume of Verax, wrote for the *Manchester Weekly Times*, when the third volume of Martin's *Life of Prince Consort* was published in 1878, articles that were republished in book form in the same year entitled *Letters of Verax*. Moreover, he seems unaware that in some histories of the house of commons considerable attention has been bestowed on the crown in politics. It is like looking a gift horse in the mouth to suggest shortcomings in Mr. Farrer's book; for it is an unusually interesting book on an exceedingly interesting subject, and a noteworthy contribution to the history of the relations of the crown and cabinet from 1760 to the end of the nineteenth century.

EDWARD PORRITT.

Hartford, Conn.

Leading Cases on International Law. By LAWRENCE B. EVANS. (Chicago: Callaghan and Company. 1917. Pp. 477.)

To the teaching of that part of international law which may be taught by means of judicial decisions, the work under review constitutes a useful aid. Beginning with Snow's well-known collection, several case books have been published, the best known of which is the voluminous compilation of Scott. In England the collection of Pitt Cobbett (3d

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ed. 1909–1913, 2 vols.) is standard among this class of books. Mr. Evans has now given us a shorter and handier collection of cases than Scott's, following somewhat the same classification, and fortified with some interpretative notes.

The primary purpose of the case book is pedagogical, that is, it is a method of teaching law, or perhaps one should say legal reasoning. The best case books maintain this function by developing legal doctrines through a graduated series of cases, some of which indeed may long since have become obsolete or been overruled but which, nevertheless, constitute building stones in the development of particular doctrines. Thus the student not only obtains training in legal thinking, but a fairly good foundation of legal knowledge which is designed to enable him to apply principles to facts. A case book with this purpose cannot be a book of illustrative cases, which serves an entirely different function, namely, to afford concrete illustrations of legal principles and show their individual applications. At times, of course, the same case may well fit into both types of book. The limitations of the subject of international law consign the case book on international law to the category of illustrative cases; and however helpful an aid that may be to teaching, it is evident that only a part of international law, for the lawyer undoubtedly the most interesting part, is illustrated by judicial decisions. Pitt Cobbett's plan of drawing for illustrations upon statutes, diplomatic incidents, the practice of foreign offices, the opinions of administrative officers, such as law officers of the government, and the awards of arbitral tribunals, in addition to decisions of municipal courts is calculated to produce a more complete source book of applied international law.

Neither type of case book can avoid reprinting some of the standard cases to be found in similar books of other editors and compilers. So we find, without any criticism, that of the 102 cases printed by Mr. Evans, 65 are to be found in Scott's collection and 6 in that of Bentwich; and various others consist of opinions merely cited or paraphrased in the notes of Scott and Pitt Cobbett. Some few new cases have been added from the decisions of British colonial courts and recent prize decisions. Pitt Cobbett's method of paraphrasing judicial opinions has enabled him to include more cases and to cover a wider range of topics, as well as to add many long and critical notes having almost the proportions of a textbook discussion. Mr. Evans' classification, however, will be more familiar to the American student; and as a case book on international law at best can serve only as a point of departure in a

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course of instruction, he has supplied a convenient collection well adapted to a course covering the brief time usually assigned to international law in the curriculum of an American university. In this respect, Scott's collection, useful as it is, has proved too bulky. Mr. Evans' notes, which manifest good judgment and discrimination in weighing decided cases, contain ample citations of authorities and references to the literature, particularly periodical articles. Some topics have apparently had to be omitted, among others, recognition, asylum, exterritorial acts, nationality and expatriation. No reference appears to have made been to the important changes recently introduced into the law of contraband and blockade; and naturally some of the able opinions rendered within the last year or two by British prize courts, which will probably replace as illustrative cases numerous earlier decisions, have had to be omitted. Nevertheless, the commendable arrangement and selection of cases, together with the many notes will assure to Mr. Evans' book a hearty welcome.

EDWIN M. BORCHARD.

Yale University School of Law.

Roman Law in the Modern World. By CHARLES PHINEAS SHERMAN, D.C.L. Three volumes. (Boston: Boston Book Company. 1917. Pp. xxvii, 413; xxxii, 496; vii, 315.)

The Anglicists have no difficulty in making a case against any extensive "reception" of Roman law in English law, by simply dwelling upon the effect of the great break in the historical continuity of Roman law in England from 449 to 1066, by not stressing too heavily the influence of Roman ecclesiastical law during that period, and by putting greater emphasis upon the antagonism of the English courts to the adoption of Roman law during the succeeding centuries. The Romanists on the other hand can succeed equally well in proving their point by dwelling upon the many likenesses between Roman law and English law and the many undoubted borrowings of the latter from the former. If, furthermore, they quote all of the somewhat uncritical statements of many writers on their side as to the debt of English law to Roman law, it looks as if there were no other side to the controversy.

Dr. Sherman is undoubtedly a Romanist, and one misses in his work a well balanced and judicial presentation of the much disputed question in the historical relations of the two systems. Sometimes the overstatements of his views approach positive error; e.g., "To Roman

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law is due the development of artificial persons, as formed in modern law" (536); again, "The common law of the Territory of Orleans was the Roman-French-Spanish-law" (263). The Louisiana supreme court said in Pecquet v. Pecquet's Exr. (17 La. An. 228) that "the laws of Spain are judicially noticed but the laws of France must be proved." These are, however, exceptions to the author's usual accuracy of statement and as he has marshaled nearly all the authorities on his side of the question his book is a valuable contribution to the literature of the subject.

A valuable feature of the first volume is its full treatment of writers on Roman law, including those of the classical and mediaeval periods, but particularly of the famous names in Italian, French, and German legal historiography. Here we find short characterizations of the authors cited and explanations of their work. The second volume has the advantage for the American student of bringing the subject down to date by the addition of references to modern Roman codes and to cases decided in English jurisdiction in which Roman law principles are discussed. The third volume on bibliography is especially well done. Because of the completeness of the bibliographical features the entire work will be very valuable as a basis for class room work if presented by a teacher who is capable of toning down its excessive Romanism.

JOSEPH H. DRAKE.

University of Michigan.

The Early Diplomatic Relations Between the United States and Japan, 1853-1865. By PAYSON JACKSON TREAT, Ph.D. (Baltimore: Johns Hopkins University Press. 1917. Pp. ix, 459.)

When in 1911 J. H. Gubbins, C.M.G., Professor of Japanese Literature at Oxford and sometime Japanese secretary at H. B. M.'s Embassy in Tokyo, brought out his *Progress of Japan, 1853–1871* it seemed that a definitive study of the period immediately preceding and following the Restoration had appeared. The author of this review, in an article in the *Transactions* of the Asiatic Society of Japan, Vol. XLII, pp. 784–802, made the following estimate of Gubbins' book, "It hardly seems possible that further research will throw much more light on the Restoration period. . . ."

There is nothing in Professor Treat's volume which makes necessary a revision of that judgment, for the private correspondence of the

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Honorable Robert Pruyn, the only new material to which he has had access, has contributed no new facts to our knowledge of the period. Yet so great is the contrast between the two books, in point of view and method, that the interested reading public will welcome the present work. Professor Treat confines himself to diplomatic proceedings, and throughout emphasizes American participation in the negotiations between the Treaty Powers and the Japanese. The method of presentation exhibits all the qualities and defects which are inherent in the standards of historical writing which have been set up in our universities. The citation of references is distractingly complete; the bibliography, while not exhaustive, is elaborate and less critical than it should be, since we do not look for an unbiased account of events in the writings of E. H. House, nor in those of Nitobé, Okuma and Brinkley. As well might one turn to the Japanese propagandists of today, Kawakami, Iyenaga, and Lindsey Russell, for accurate views. The generalizations of the present work are unobtrusive, but at times too hastily formed; the general tone is highly laudatory of the acts and intentions of the American diplomatic representatives, especially when contrasted with the "arrogance" of their British colleagues.

The first half of the book repeats the narrative of the years 1853–1858, and the statements are based upon Harris' official correspondence and diary—edited so brilliantly and inaccurately by Griffis in his *Townsend Harris, First American Envoy to Japan*—supplemented by the British Blue Books on Japan, the Japanese unofficial records—the *Kinsé Shiriaku* and *Genji Yume Monogatari*—and secondary books. The last five chapters cover the story of the troubled years which followed the signing of the treaties by the Shogun's government. The turbulence of the period between 1858 and 1865 was due, as all competent writers since Mossman (1873) have agreed, to the failure of the emperor to ratify the treaties. Professor Treat adopts this view, setting it forth even in his preface, but in so doing he has offered no new explanation of the events. In a further generalization in this connection he surely falls into error when he states that in the domestic controversy as to whether the treaties were to be ratified or the foreign "barbarians" expelled, the Shogun's government consistently favored the former policy (pp. 375, footnote, and p. 408), and the imperial court the latter, and hence the Treaty Powers in pressing for ratification necessarily aligned themselves with the Shogun against the court. Such a statement is at most only half true. Whether or not the Shogun supported ratification depended on whether the pro-foreign or anti-foreign party

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dominated his councils in Yedo. How else can the Exclusion Edict of June, 1863, be explained? It is beside the point to say that the Shogun was merely playing up to the sentiments of the emperor and did not intend that his instructions to expel the foreigners were to be taken seriously. Not all the "searchings of heart" on the question of expulsion went on in Kyoto. Yedo too had its lapses from strict adherence to the spirit of the treaties, as the edict in question demonstrates.

When this book reaches a second edition, it is to be hoped that the author will restate his generalizations where they are in error, will annotate his bibliography so as to indicate the relative merits of the secondary books mentioned, will moderate his unduly harsh anti-British tone, and remove some of the traces of his pro-Japanese bias, derived doubtless from the habit of relying too implicitly upon the writings of disguised Japanese propagandists.

W. W. McLaren.

Williams College.

The President's Control of Foreign Relations. By Edward S. Corwin, Ph.D. (Princeton: Princeton University Press. 1917.)

Professor Corwin's monograph on the President's power over the foreign relations will probably not need material revision or amendment hereafter. The controversies that have arisen between the executive and the legislative departments, so far as those relations have been concerned, cover practically all the points on which there can be dispute, and the results of former controversies are not likely to be reversed. If this were a general treatise on the powers of the President, what a change in it must by and by be made in a chapter on the President's invasion and capture of legislative powers, all of which the Constitution bestows on Congress!

In practically every contest in whatever field between the President and Congress, from the very beginning, the victory has rested with the President. Congress had ultimately to admit that it was wrong, even in the Tenure-of-Office Act with which it tied the hands of President Johnson. In all the matters of foreign relations both the right and the victory have been with the President. The language of the Constitution upon which successive Presidents have relied is sufficiently vague, but it gives no support to the contentions of Congress. Diplomacy and all the functions connected with diplomacy are surely executive and not legislative.

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Professor Corwin cites the facts and the arguments employed on every point that has been in controversy in that branch of the government, and comments briefly and judiciously upon the result. It has been a continuous development. The expressly-conferred power to appoint ambassadors has come, not without strong congressional opposition, to carry with it an exclusive right to recognize or to refuse to recognize foreign governments the product of revolutions. The division of the treaty making power has repeatedly led to a claim from the senate that the right of initiative was also divided. And the reservation to Congress of the power to "declare" war has left to the President a gradually increasing power so to conduct the foreign relations as to render war inevitable, even to force a foreign government to declare war upon us.

On all these points, which here are merely outlined, the historical and documentary presentation of the facts leading to conclusions, by Professor Corwin, is full and satisfactory. What in other treatises on the diplomatic history is usually put in a single chapter, our author has given in full and logical detail.

EDWARD STANWOOD.

Brookline, Mass.

The Foreign Policy of Woodrow Wilson. By EDGAR E. ROBINSON and VICTOR J. WEST. (New York: The Macmillan Company. 1917. Pp. vi, 428.)

The authors frankly acknowledge that there has been much adverse criticism of President Wilson's foreign policy, especially the part dealing with Mexico and Germany; but they avow the belief that such criticism would disappear if the policy were fully understood. To promote such an understanding has been their purpose. The authors devote 159 pages to the interpretative development of the policy; 16 pages to a chronological statement of the more important events in our foreign relations; and 234 pages to excerpts from the principal utterances of the administration, concluding with the reply to Pope Benedict XV.

President Wilson is portrayed as a political philosopher whose administrative acts have been, and are, grounded upon well reasoned principles. In spite of a policy of "watchful waiting" towards Mexico, Huerta was not recognized because he obtained power through treachery and violence, while Carranza was recognized only after President Wilson accepted the mediation of the "A.B.C." powers. Even the sending of troops into Mexico was not armed intervention which violated

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the sovereignty of Mexico, but merely protection for the frontiers of the United States. President Wilson's attitude thus shows a contempt for a government that does not rest upon the real consent of the governed; but a high respect for the use of mediation, and a scorn for the use of force by a powerful state to coerce a small state.

In dealing with the Chinese loan, Wilson declined to sanction the practice of "dollar diplomacy" because it might lead to interference in the internal political affairs of China. He stood for the open door of friendship and mutual advantage. Towards Japan he acted with deliberation, patience and mutual understanding. He insisted on and secured the repeal of the act exempting the coastwise trade of the United States from tolls for the use of the Panama Canal, because he believed the sanctity of a treaty with Great Britain had been violated by this act.

In the diplomacy dealing with the world war, President Wilson, by soundness of reasoning and facility of expression, made himself at once the leading spokesman of the neutrals, and for the same reason he now occupies a primacy for the Allies, since our entrance into the war. His passion for democracy is such as to make him willing to have the United States enter the world war in order to make the world "safe for democracy,"—a new kind of Monroe Doctrine given an international application. The authors have done an interesting and timely piece of work.

J. S. YOUNG.

University of Minnesota.

The Rebuilding of Europe. By DAVID JAYNE HILL. (New York: The Century Company. 1917. Pp. x, 289.)

Those who are familiar with Dr. Hill's earlier volumes and who have admired in their author the combination of a strong sense for the value of law with an equally strong belief in the necessity of its progressive development to meet human needs, will not be disappointed in the present volume where the same mental attitude is applied to the more complex and more pressing problem of international relations. In *The People's Government* and in *Americanism, what it is*, Dr. Hill examines the spirit of our domestic institutions and emphasizes that rights are based upon an intuition of mutual obligation, that law is not the result of a sovereign decree but the embodiment of principles of justice inherent in human reason. Self-government is therefore a government controlled by self-discipline and self-restraint, and is the very antithesis of absolutism whether of kings or of popular majorities. So too

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in *The Rebuilding of Europe* Dr. Hill points out the contrast between the absolute state and the democratic state in respect to the attitude of each towards the authority of international law as it has existed in the past and towards the possible strengthening of its authority and the enlargement of its scope in the future. He emphasizes at the start that "the Great War was not in its beginning, and is not now, so much a struggle between different forms of government as it is a question regarding the purpose and spirit of all governments;" and in chapter after chapter he shows the intimate connection between the possibility of a stable international peace, based upon law and justice, and the theory of the individual state whether as a "will to power" or as a "will to justice." In considering the problem of "International Organization" Dr. Hill differs from the advocates of the League to Enforce Peace and other plans for "a general international government" in that he is prepared to admit into a league of nations only the smaller group of constitutional states which have "approximately identical types of government." He is opposed to anything in the nature of a "superstate," but on the other hand urges forcibly the need of the "renunciation, to some extent at least, of absolute sovereignty," and goes so far as to hold that the constitutional states, assembled in conference, must be ready to "submit to any decisions in the nature of general laws which after full discussion the large majority is willing to accept and agrees to observe."

Though popular in form Dr. Hill's volume will prove of more than passing value. He is dealing with the fundamental principles of law and justice which in their various aspects must underlie all forms of government, national or international. The only regret of the reader will be that the several chapters of the volume, being a reprint of magazine articles and of public lectures, do not present their thought with that conciseness of language and logic of sequence which would more effectively direct the attention of the country to the vital problems they discuss.

C. G. Fenwick.

Bryn Mawr College.

Political History of Poland. By E. H. Lewinski-Corwin. (New York: The Polish Book Importing Company. 1917. Pp. xv, 628.)

This is the most detailed and comprehensive, and one of the most readable and illuminating of the numerous histories of Poland which

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the war has brought us. The author shows a wide acquaintance with Polish historical literature, insight, accuracy, and a sense of proportion. Despite the title, he has given an unusual amount of attention to social, economic, and intellectual development. Particularly interesting is the account of the events in Poland since the outbreak of the war, although one may be allowed to doubt whether the pro-Austrian and anti-Russian tendency among the Poles has been quite so strong as is here affirmed.

In spite of the terrific devastation caused by the war, and the precarious position of the new Polish government, which owes its origin to the Central Powers but is probably resolved to part company with them at the first opportunity, the author is confident that "the Polish question has never before been so near its full and satisfactory solution." The solution to which he looks forward is "a reconstructed and united, free and independent Poland," connected by federal ties with a free Lithuania and a free Ukraine, that is, the reëstablishment on a democratic basis of the huge empire of the Jagellonians, the second largest state in Europe.

The American public has never been lacking in sympathy for Poland, but it has, perhaps, been slow to recognize the fact emphasized in this volume, that the restoration of the Polish state is today more necessary than ever before: not only as an act of international justice, but also because this gifted and virile nation, which has spent its historic life in resisting the Teutonic *Drang nach Osten* and which holds so important and exposed a geographical position, is capable, if given its rights, of becoming one of the strongest barriers against the designs of Pan-Germanism, one of the essential bulwarks of the liberty of Europe.

R. H. Lord.

Harvard University.

The Town Laborer, 1760–1832: The New Civilization. By J. L. Hammond and Barbara Hammond. (London: Longmans, Green and Company. 1917. Pp. xii, 346.)

The authors of *The Village Labourer, 1760–1832*, have now completed their picture of political and industrial England for the period between the Industrial Revolution and the passage of the Reform Bill, by describing for us the lot of the town laborer. It is a faithful and sympathetic and, therefore, a sad narrative; but it is an informing one, for the authors do not merely describe objective facts, recount the old

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story of inventions, or parade statistics of output, wealth and foreign trade. Rather they try to understand the meaning of the changes that were going on, to fathom the psychology and the political and economic philosophy of the masters and men which permitted such grave abuses. And in so doing they have presented a fresh and interesting account of events which have been often described.

Perhaps in no way can the unconventional point of view and treatment of the authors be better shown than by naming the titles of a few of the sixteen chapters. Such are the new powers, the new discipline, the new town, justice, order, the mind of the rich, the conscience of the rich, the defenses of the poor (the spirit of union and the spirit of religion), the ambitions of the poor.

The first three chapters describe the Industrial Revolution, and, while they add nothing to our knowledge of the changes embraced under that name, are based upon a study of primary sources. The chapters on justice and order give a clear insight into the point of view of the ruling classes by whom "the law is treated as an instrument not of justice but of repression," and in whose hands "the courts become the recognized instrument of a class supremacy." Order was to be maintained by a policy of stern and unyielding repression. This was the attitude of mind which led to the relentless war on trade unions which continued until the repeal of the combination laws in 1824—and afterwards. The employment of children in mills and in mines and factories is described in two sympathetic chapters.

Perhaps the most interesting part of the book is that in which the authors endeavor to set forth the economic philosophy and the ethics of the employing class. The former was based upon a crude individualism which ignored the real status of the laboring class. "They thought that if society looked after the capitalist, the capitalist would look after the workman, and that if society took care of the interests of property, the deserving poor would become rich." The conscience of the rich was assuaged by a cant philosophy which taught a servile standard for the poor. "Resignation was the message of religion as it was of nature."

The poor on the other hand found their outward defense in trade unionism, their inward defense in the consolation of religion, especially as taught by the Methodist Church. Their ambitions were twofold: an economic struggle which was dissipated in the visionary program of Owenism, and a movement for political reform which after the Reform Bill sought fulfillment in Chartism. Finally, the authors conclude that the attitude of the ruling and propertied classes can be explained only

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on two grounds: first, the fear of an uprising like the French Revolution; and second, the belief in the sanctity and civilizing influence of property. Order and property must at all hazards be maintained, and in the midst of the rapid economic changes which were occurring this could be accomplished only by a policy of stern repression. Under such circumstances there was no hope for the poor.

This philosophy, which dominated the thinking of middle-class Englishmen during the nineteenth century, has been rudely shaken by the present European war. "New Lessons have been learned from the sacrifices made by every home, in the struggle with a spirit that presents the most sinister aspects of the industrial system in a military form." Hence for us today this history of the past has a new value.

E. L. BOGART.

University of Illinois.

The High Cost of Living. By FREDERIC C. HOWE. (New York: Charles Scribner's Sons. 1917. Pp. 275.)

It would not be so easy to quarrel with Mr. Howe's book if he had given to it a title describing its contents. He has written on the subject of food, but one item in the cost of living, taking about two-fifths of the expenditure of the normal family. For this reason nothing save the title warrants calling attention to the fact that he ignores the basic cause for the rise in prices, namely, the world inflation of currency and credit, aggravated by the transfer of perhaps fifty million workers from peaceful production to the tasks incident to unprofitable destruction. The title would not have misled had it epitomized the proposition laid down in the preface: "Monopoly is responsible for the conditions which confront us." As a development of this thesis in its application to food, the book is an interesting specimen of the scapegoat variety of economic literature.

The blame is all laid at the door of the agencies between the producer and the consumer. Buyers, speculators, packers, railroad and steamship managers, cold storage operators—these and the other classes of profiteers that have to do with the distribution of food, share in the castigation. No stress is laid on causes working at either end of the line. No importance is attached to the pressure of population on the means of subsistence, on the occupation of all the arable land, the breaking up of the Western ranges into farms, the exhaustion of soils, the costly recourse to fertilizers. No stress is laid on wasteful habits

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of consumption, poor cooking, indulgence in out-of-season foods, country-wide transportation of delicacies, competition for the choicest cuts and varieties, delivery in packages, and a hundred other results of extravagant tastes and ignorant customs. "Monopoly is responsible," and monopoly is monopolized, so to speak.

Even in respect to monopoly, the author differs from most of those who have given scientific investigation to the subject. He minimizes the economic gains that come from joint activities. For example, while dwelling on the enormous profits made by the big packing companies and holding them responsible for the disappearance of local slaughtering, which he would revive, he does not bring out the fact that the huge profits of central slaughtering are due to the utilization of by-products that local slaughtering wasted, and that meats probably cost us far less today than they would if the big packing houses were wiped out of existence and the system of local abattoirs Mr. Howe advises put in their stead.

As far as the author admits benefit from joint activity, he wants it to accrue to the public welfare through public ownership and operation. Here he reaches ground where he may hope for some degree of sympathy from students of the subject. There can be little question that if there is any field where the public resources can be wisely turned into the form of fixed capital, it is the field of the necessities of life. We may welcome, therefore, the stimulus this book may give to the public demand for development of terminal facilities, markets of all sorts, elevators, warehouses, cold storage plants, and even the public ownership of the costlier farm implements, tractors, planting and harvesting machinery, and all the other appliances of food production and distribution. Whether we ought to go beyond the use of the public credit for the furnishing of capital, that is, whether we ought to operate as well as own, would arouse much more controversy. The information Mr. Howe gives about what other countries are doing in these matters is instructive and helpful. Furthermore the book by stimulating a lethargic public into mental activity may justify hyperbole that would not be found in the writings of a scientific investigator solicitous for a balanced and discriminating presentation of facts.

ROBERT LUCE.

Boston, Mass.

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Philosophy and the Social Problem. By WILL DURANT. (New York: The Macmillan Company. 1917. Pp. 272.)

The purpose of this book can best be stated in the words of the author's opening paragraph. It is "to show: first, that the social problem has been the basic concern of many of the greater philosophers; second, that an approach to the social problem through philosophy is the first condition of even a moderately successful treatment of this problem; and third, that an approach to philosophy through the social problem is indispensable to the revitalization of philosophy." In carrying out this design the author first analyzes the philosophy of Socrates, Plato, Francis Bacon, Spinoza, and Nietzsche in so far as to indicate the social and political bearings of their ideas; and, second, outlines a scheme for facilitating the reconstruction of society under the guidance of philosophers of today.

In the first part, the social significance of the doctrines of the five selected philosophers is shown in such of their leading ideas as the following: Socrates—the identification of intelligence and virtue and the social effectiveness of the spread of intelligence; Plato—the importance of having a clear social ideal and of developing superior men, experts in foresight and coördination, to whom social reconstruction can be intrusted; Bacon—the organization of science for social application and control; Spinoza—the adaptation of the inevitably self-seeking impulses of individuals into springs of intelligent coöperation; Nietzsche—the hopelessness of an unintellectualized democracy, and the indispensableness of leaders of native and cultivated power.

In the second part the author offers, not a philosophy of his own, but a scheme whereby philosophers may cultivate and direct the application of organized intelligence to social problems. To him the philosopher of today is simply the man who can discover and define the goal of social progress and who knows "the essentials of geology and psychology, of sociology and history, of economics and politics" and who knows how to coördinate and make socially fertile these essentials. The scheme is that of a "Society for Social Research." A résumé of the composition and work of this society (consisting in first instance of selected "physicians and professors" as a "nucleus of recognized intelligence") would make the scheme appear wholly impracticable and futile. And doubtless even a full reading at first hand would not remove skepticism from most readers. For the novelty and apparent artificiality of the proposal are such that, at best, adherents could be gained only by a

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fuller description of details and a more cautious consideration of difficulties than the book affords.

The book can be taken, both in its historical and, especially, in its constructive parts, only as a sketch. The former is done faithfully and with some brilliance and independence of interpretation, which, with an incisive style and a flexible vocabulary, makes that part of the work interesting and suggestive for students of politics in its less mechanical aspects. It may not be ungracious to suggest that at a few points the author does his own style injustice by efforts to be superfluously "happy" through the employment of epigrams—and even puns—which seem neither illuminating nor enlivening. Moreover, the author appears to be not without prejudice in his judgment of political philosophers; and for many readers it will be difficult to understand how one who has read the *Politics* can say summarily that "the Stagirite spent too much of his time in card-cataloguing Plato and allowed his imagination to become suffocated with logic."

F. W. Coker.

Yale University.

International Realities. By Philip Marshall Brown. (New York: Charles Scribner's Sons. 1917. Pp. xi, 226.)

Mr. Brown is convinced "of the urgent necessity of a thorough reconstruction of the law of nations in accordance with the big facts of international life." These "big facts" he asserts to be the dictates of "enlightened self-interest, interpreted as the application of the Golden Rule to the affairs of nations."

The most fundamental interest of the state is discovered to be its nationality. Mr. Brown has somewhere written that if the law of nature be shown out of the front door, it will creep in at the back. In the present book after protesting against the identification of international law with the law of nature (pp. 7, 11), he says (p. 224) "the vitally significant fact which International Law must recognize is that there is a natural tendency among men to gravitate in distinct national groups." It is this natural phenomenon of nationality which he maintains "we must recognize as determining the separate existence of states." Has he left his back door unlocked? It would be rash, indeed, to assert that so elusive a customer is even now in Mr. Brown's house. But it is obvious, on the other hand, that the author confuses the fact of political control by an organized government—the fact with which

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international law must primarily deal—and problems of ethics, morality and policy. Nor does he face the practically crucial cases of inextricably intermingled nationalities such as those of Austria-Hungary and of our own South.

The constant quotation of Lorimer is hardly calculated to lend additional authority to the author's own contentions. Whether one can agree or not with Mr. Brown's constructive ideas, it is impossible not to sympathize heartily with his rebellious attitude toward the artificiality of our current treatment of international law.

ROBERT T. CRANE.

University of Michigan.

Hugo Grotius. By HAMILTON VREELAND, JR. (Oxford: Oxford University Press. 1917. Pp. xiii, 258.)

Dr. Vreeland has written an appreciative and sympathetic life of Grotius. The author properly says of Grotius "that it is almost impossible to discuss fully or minutely his many phases," hence he confines himself more particularly to the consideration of the life of Grotius as a publicist. The volume relies particularly upon the material found in and referred to by Brandt, van Cattenburgh, and de Burigny. Certain authors of merit of the eighteenth century are not mentioned, though they may have been consulted.

This life of Grotius furnishes an excellent introduction to the father of international law whose work is of the greatest importance in this time of war, because Grotius himself was writing at a time when war was widespread and because his great work on the law of war and peace received particular consideration in the negotiations which brought the Thirty Years' War to a close. Portraits make the descriptions more vivid, and an index adds to the value of the book.

Without professing to exhaust or to write a monumental volume Dr. Vreeland has in a very pleasing manner done a timely piece of work by again showing what Grotius contributed to the world and by emphasizing the present value of many of his contributions.

G. G. WILSON.

Harvard University.

The Separation of the Churches and the State in France. By W. H. H. STOWELL. (Amherst, Mass., 1917.)

In this slender volume of some one hundred pages the author attempts to give in brief compass and popular form a justification of the separation.

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Three of his six chapters are devoted to an historical sketch of the origin and growth of the temporal power of the Roman Catholic Church. The ambition and energy which led to the acquisition by the church of authority over nonspiritual affairs are stressed, but not the breakdown of the civil power which gave to the church its opportunity and which made this growth of temporal power practically inevitable.

Turning to the present situation Mr. Stowell argues that the whole matter is simply a clear-cut question of sovereignty. "The clerical idea of citizenship is incompatible with liberty or democracy. Democracy must be free to live its own life and make its own laws. Clericalism demands ecclesiastical authority over political matters." In checking clericalism, however, the government is not unjust; it guarantees free religious worship instead of destroying it, protects religious property but does not confiscate it, and gives to all religions equal opportunity.

The final chapter which embodies the provisions of the law of 1905 should be presented in an appendix and the reader informed whether he has before him the actual text of the law or merely a summary of it.

ELOISE ELLERY.

Vassar College.

The Canadian Railway Problem. By E. B. BIGGAR. (New York: The Macmillan Company. 1917. Pp. 258.)

This book, published so soon after the report of the Royal Commission appointed "to inquire into railway and transportation in Canada," and at a time when there is so much public interest in the railway situation in the United States, is quite timely. As the publishers have stated in their announcement, "the author supplies many facts and incidents . . . which are not to be found in the report recently issued by the Railway Commission, and he makes out a very strong case for National Ownership of Railways."

His case would be stronger, however, if he were not so ardent an advocate. While he asks that in judging the administration of the post office department we should make "allowance for those imperfections which characterize human effort in all spheres of work," he shows no disposition to make such an allowance for the owners and managers of private-owned railroads. They are held responsible for nearly everything that has gone wrong in Canada since the fifties.

Mr. Biggar's thesis is that the railway rate is a form of taxation.

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"No tax is so far reaching and inevitable as that proposed for the transportation of persons and goods." The power of fixing such taxes, therefore, is a function of government and should not be affected by the element of profit for the private owners.

The author has put together much interesting material concerning the early history and the later development of Canadian railways, and he has skillfully marshaled the arguments which defend the operating results of the Intercolonial Railway and which favor nationalization as the solution to the very trying railway problem which confronts Canada today. The book, moreover, is written in a style which should hold the interest of the reader, although at times there is a tendency to substitute rhetoric for argument.

WM. J. CUNNINGHAM.

Harvard University.

Official Letter Books of W. C. C. Claiborne, 1801–1816. Edited by Dunbar Rowland, B.S., LL.B., LL.D., Director Mississippi Department of Archives and History. Six volumes. (Jackson, Mississippi: State Department of Archives and History. 1917. Pp. viii, 394; 394; 399; 423; 400; 468.)

The publication of the *Letter Books of W. C. C. Claiborne* will be welcomed by students of American political institutions. Beginning with 1801 when he became governor of Mississippi Territory, the letters form an almost unbroken narrative to the end of his term as governor of the state of Louisiana in 1816. The bulk of the correspondence pertains to problems of government in Orleans Territory (1804–1812), where a population composed largely of French, Spaniards and Indians, with a sprinkling of Americans, presented many difficulties to the young governor.

It is unfortunate that the editor has chosen to pass by the *Claiborne Papers* in the Bureau of Rolls and Library of the Department of State in Washington with the slighting remark that they are "incomplete copies of the originals" (p. viii), for which statement there is no justification. Examination of this collection would have enabled Dr. Rowland to fill in a number of *lacunae* in his text. Especially is this true of the gap from December 31, 1804, to May 4, 1805 (III, 36), and from November 25, 1805, to January 11, 1806 (III, 238); while in at least two other instances (IV, 123–143; V, 24–34) the record could have been considerably amplified. The investigator is advised to

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consult David W. Parker, *Calendar of Papers in Washington Archives Relating to the Territories of the United States*, which contains a list of the Claiborne papers in Washington.

EVERETT S. BROWN.

Washington, D. C.

Collective Bargaining in the Lithographic Industry. By H. E. HOAGLAND.

Contemporary Theories of Unemployment, and of Unemployment Relief. By FREDERICK C. MILLS.

(Columbia University Studies in History, Economics and Public Law, LXXIV, No. 3; LXXIX, No. 1. New York: Longmans, Green and Company. 1917. Pp. 130; 164.)

Dr. Hoagland's study is one of a series of investigations of wage bargaining made by him for the United States Commission on Industrial Relations. It is an attempt "to trace the history of collective bargaining in the lithographic industry," and the author has successfully accomplished his purpose. In tracing the history of the labor contract the author notes four stages in the method of wage determination: (1) custom; (2) union dictation; (3) mutual agreement between unions and employers; (4) dictation of an employers' association—the method prevailing at present. Students of the labor problem will find this monograph both interesting and stimulating.

The monograph by Dr. Mills is primarily a study of contemporary English and American theories of unemployment and of unemployment relief, but its scope is widened to include a presentation of the theories of unemployment held by the classical economists and the practical measures of the English Poor Law. Because of their influence upon American theories of unemployment, the larger part of the volume is devoted to the treatment of English theories and suggested remedies. The author finds that there has been no synthesis of the subject and no scientific treatment of the problem of unemployment as it faces the United States today. The subject matter is too comprehensive to be presented in a monograph and for this reason the study is extensive rather than intensive. It is a valuable contribution to the literature on unemployment.

GORDON WATKINS.

University of Illinois.

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Marketing Perishable Farm Products. By ARTHUR B. ADAMS. (Columbia University Studies in History, Economics and Public Law, LXXII, No. 3. New York: Longmans, Green and Company. 1916. Pp. 180.)

This treatment of an important aspect of market distribution is timely and deserves a wide reading. While much of the development is not entirely original, the point of view is well sustained and the analyses are unusually clear. The constructive purposes of the author are manifest at every turn and usually to good advantage. The author shows an understanding of the marketing trade that ranks him well among specialists in this field. This fact adds to the value of the work. Perishables naturally are the most difficult of farm products to treat from this point of view. One cannot well lay this volume aside without careful reading if he wishes to keep abreast of the subject of marketing on the agricultural side.

The mechanical features of the volume are poorly handled. The table of contents disagrees in wording with the division headings, the footnotes are not well organized, and there is complete lack of an index or even of a bibliography. The tables of statistics are compiled from sources that require more adjustment to one another than the author works out for us. Dates are omitted all too persistently.

CHARLES L. STEWART.

University of Illinois.

MINOR NOTICES

In *America's Case Against Germany,* (New York: E. P. Dutton and Company, 1917, pp. xiv, 264), Professor Lindsay Rogers has undertaken to present a review of the main points in the controversy between the United States and Germany which led ultimately to the outbreak of war between the two countries. He discusses in turn Germany's submarine policy, the sinking of the *Lusitania,* the *Sussex* and other ocean liners, the repudiation by the imperial government of its pledges regarding the sinking of merchant vessels, the armed merchantmen controversy, the question of the exportation of munitions, the right of retaliation, and other questions of international law. He examines the contentions put forward by both governments in the more important diplomatic notes which deal with these questions, and comments upon many of the views put forward by the German government as an excuse

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for its shameful disregard of the law of nations and the established usages of the past. The book is written in a popular and untechnical style and the author's reasoning is both clear and logical. Many points in the indictment against Germany are untouched; but there is quite enough to convict the German government before any impartial tribunal and to justify abundantly our own action.

The book contains a useful bibliographical note and some illustrative material in an appendix.

The Macmillan Company has recently published a *History of Europe from 1862 to 1914* by Colonel Lucius H. Holt, and Captain Alexander W. Chilton, both of whom are teachers of history at West Point. The book lays special emphasis upon those events which have influenced the course of international relations, and has relegated to the background many minor questions of internal politics which have hitherto cluttered up the pages of general histories despite their relative lack of any real importance. The authors have given military matters their proper share of consideration, but there is no over-emphasis upon this phase of European history. These military chapters, which are the work of Captain Chilton, present more illuminating discussions of such historical episodes as the Danish War of 1864, the Russo-Turkish War of 1877–78 and the Russo-Japanese War than one can easily find within such concise limits elsewhere.

The members of the division of education at Harvard University have published a volume on *The Teaching of Economics at Harvard* (Harvard University Press, pp. 248) which embodies the results of an elaborate technical study made during the last three years into the scope, methods and results of the various courses offered by the department of economics at Harvard. The book is of considerable interest to all teachers of political science because it indicates the nature of the various tests which experts in pedagogy apply to instruction in the field of the social sciences, and also because it discusses fully a problem with which every teacher of politics or government today finds confronting him, namely, the need for making instruction "more practical." What is said in this book concerning the teaching of economics at Harvard would probably apply without much alteration to the teaching of political science at any large institution of higher education in the United States. The educators who carried on this inquiry make no specific recommendations; their aim has merely been to "provide an adequate basis of fact" from which teachers of economics may themselves draw appropriate conclusions.

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An excellent report of nearly six hundred pages entitled *A Survey of the Government of the City of Indianapolis* has recently been published by the Indianapolis Chamber of Commerce. This embodies the survey of Indianapolis made by the New York Bureau of Municipal Research. Every branch of the city government has been carefully studied and criticized in a thoroughly impartial, scientific manner. The investigation of the police department is particularly well done. The results of the survey are summed up in thirty-seven pages of helpful, constructive recommendations, many of which would apply with equal force to not a few American cities.

A Survey of the Revenue System of Delaware County, Pa., is an interesting and valuable study of local tax methods, by Dr. G. Watkins of the University of Illinois. As it is confined to county revenues, it deals primarily with the general property tax. The account of its workings in the district examined simply confirms the indictment of this tax already made in other similar studies. The inefficiency of the assessors, due in part to the method of election, in part to inadequate pay ($2.50 a day), and in part to lack of equipment; the inequality of assessment, the relation of the assessed to the true value ranging from 20 to 70 per cent in different townships; the unjust treatment of small as compared with large properties; the undue burden placed on realty by the escape of personalty—all these evils are familiar to the student of local taxation in the United States. Dr. Watkins suggests no remedy, but lets his facts speak for themselves. Such intensive studies as this are needed to bring the truth home to the local taxpayer.

A useful little volume on *Statistics*, covering in concise form such matters as the gathering of material, the editing of schedules, schemes of tabulation, ratios, averages and graphic representation, has been prepared by Professor William B. Bailey and Dr. John Cummings (A. C. McClurg & Co., pp. 153). The book will be of distinct value to those who desire an acquaintance with the elements of statistics but who have neither the time nor the interest to study the technical phases of the subject. The material is arranged with admirable clearness and is presented in interesting form.

Professor H. C. Dale's *The Ashley-Smith Exploration and Discovery of a Central Route to the Pacific, 1822–29* (A. H. Clark) contains two long letters and one journal concerning several journeys of exploration into

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the Colorado and Nevada region of the Rockies and from there on to California. Ashley and Smith were prominent furtraders of St. Louis and opened up for exploitation this middle region of the mountains. The publication of this new material on the fur trade has given occasion to the editor to write the best short account of the furtrading operations centering in St. Louis that has thus far appeared. The book is profusely annotated and the whole editorial apparatus is most excellent.

The Boston Book Company has recently issued a volume on *Equity in its Relations to the Common Law* by William W. Billson of the Minnesota Bar. The work strikes out along new lines in the endeavor to demonstrate that equity has not been historically restricted to the amelioration of defects in the common law but that it has had for its province the enforcement of a superior legal morality. To this end the author discusses the development of equity jurisprudence both in Rome and in England, demonstrating that there is more similarity between the two than has commonly been recognized.

Tort, Crime and Police in Mediaeval Britain by J. W. Jeudwine (London: Williams & Norgate, 1917, pp. 292) is an analysis of the subject based wholly upon the original sources. The author has no particular thesis to maintain. His purpose has been to let the records tell their own story; and although this policy has somewhat impaired the readability of the book, it finds ample justification in the trustworthiness of the author's conclusions. As a convenient work of ready reference on a great many minor topics of mediaeval English jurisprudence this book will be of service.

A further volume containing the collected essays and speeches of the Hon. Elihu Root has been issued by the Harvard University Press. The title of this issue is *The United States and the War, The Mission to Russia.* The various chapters have been edited by Robert Bacon and James Brown Scott. The larger part of the volume is made up of addresses delivered either in the United States or in Russia during the year 1917. Mr. Root's Russian speeches are here for the first time made available to American readers.

Under the title of *The War Administration* an illustrated presentation of the war message delivered to Congress last April has been issued by the Walton Advertising and Printing Company of Boston. The

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brochure contains, in addition to the war address, portraits of the President, the vice president and the members of the cabinet, besides short biographical sketches of each.

The December number of *The Round Table*, a review of British imperial politics, contains articles on the war written by British residents in all corners of the empire. The effects of the war upon India are treated at length. All the articles are readable and free from bias.

The Century Company has recently published *An Introduction to Social Economy* by Professor F. S. Chapin of Smith College. The book contains a general survey of social and industrial evolution with stress upon the historical changes in industrial organization and their effect upon the life of the people.

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RECENT PUBLICATIONS OF POLITICAL INTEREST

BOOKS AND PERIODICALS

BEATRICE OWENS[1]

AMERICAN GOVERNMENT AND PUBLIC LAW

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[1] Scandinavian and Dutch references supplied by Clarence A. Berdahl.

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